

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

USING THE AALS SECTION (AND ITS NEW WEBPAGE) TO BUILD COMMUNITY [IES]

By Laurel S. Terry
(Penn State Dickinson School of Law)



I am very pleased to be the Chair of the AALS Section on Professional Responsibility during the year in which the AALS has unveiled its new web platform. The AALS Section of Professional Responsibility was one of the first sections to receive its website, which is available at <https://connect.aals.org/li?redir=p%2Fco%2Fin%2Fgid%3D145>

In order to access our Section's new website, you will need:

- 1) to have activated your AALS electronic directory listing using your AALS log-in name and password. You should have received these by snail mail from the AALS, but if you've lost them, [the AALS will email them to you](#); and
- 2) to have selected "Professional Responsibility" as one of your free [AALS sections](#) (You can join an unlimited number of sections)

Once you have completed these two tasks, you can select "Communities" from the menu bar, then "Sections" and then

"Professional Responsibility." (And if you go to "My Options" on the right hand menu bar, you can make the PR Section one of your "Favorites" so that you don't have to bother with all of this every time you login to see the webpage.)

In my view, one of the most important roles of the AALS PR Section is to help us build a sense of community as Professional Responsibility teachers and scholars. The AALS Annual Meeting provides a useful opportunity for us to meet each other in person, learn something new, exchange views, and put a face with a name that we only knew on paper. But a once-a-year meeting that provides relatively few opportunities to interact within one another is probably not enough to sustain a sense of community.

Luckily, past Section leaders have taken a number of steps to help foster a sense of community. I am sure there are many efforts that I am not (yet) aware of, but I can recall that Carol Needham instituted the "scholarship roundtable" sessions that have become a regular feature at the ABA National Conference on Professional Responsibility.

INSIDE THIS ISSUE

MESSAGE FROM THE CHAIR	1
SECTION ANNOUNCEMENTS	4
PROFESSIONAL OPPORTUNITIES	7
RECENT DEVELOPMENTS	8
RECENT SCHOLARSHIP	20

(Look for Carol's newsletter blurb about the May 29, 2009 Roundtable Session at the Center on Professional Responsibility (CPR) conference in Chicago). Judy McMorrow instituted a Professional Responsibility Poster Session, which was so well-received that poster sessions have now become a regular feature of the AALS' Annual Meetings. (We'll be looking for posters for this January.) Lisa Lerman and Mary Daly helped organize an "academics" meal at the ABA CPR's annual ethics conference, which is where many of us have gotten to know each other. (Look for the newsletter blurb about this year's dinner in Chicago.) Marie Failinger introduced the concept of an "announcements" newsletter, in which we can share news of our activities and get to know each other better outside of our scholarship. Russ Pearce presided over the recent Bylaws amendment that expanded the Executive Committee to twelve members so that we could have greater involvement on the part of our members. (He also helped facilitate the reception and Scholarship Roundtable that was held at Fordham during the 2008 AALS Annual Meeting.) Irma Russell helped facilitate the establishment of the Section's liaison position on the ABA's Standing Committee on Ethics and Professional Responsibility; Ted Schneyer currently serves as the Section's first liaison and has used the Section's newsletter to keep us apprised of the issues currently pending before that Committee.

And then there are our newsletters....if you haven't taken a look at them recently, check them out! They are terrific and full of useful content. We owe a debt of thanks to all of our current and past newsletter editors and contributors. I hope that we will include the names of past newsletter editors and contributors in the "history" folder on our

website (more on that later), but in the meantime (and at the risk of offending some folks), I would like to extend my thanks to recent newsletter editors Randy Lee, Sam Levine, and Ernie Lidge and to contributors such as Fred Zacharias (scholarship review), Susan Carle (case law review), and Roy Simon (regulatory changes). The AALS PR Section's newsletter has played an invaluable role in helping build a sense of community among professional responsibility teachers and scholars.

The AALS PR Section website has the potential to allow us to build on the efforts described above and help us create a new level of community. Technology innovations already have made this sense of community much easier than when I first started teaching. In addition to snail mail, the telephone and print journals such as the Georgetown Journal of Legal Ethics, we can now communicate with each other almost instantaneously via email, instant messaging and Twitter. There are electronic resources such as the legal ethics list-servs (*e.g.*, the APRL listserv and the Washburn list for academics), legal ethics blogs (*e.g.*, <http://www.legalethicsforum.com/> and <http://www.legalethics.com/>), legal ethics scholarship aggregators (*e.g.*, SSRN's [Legal Ethics & Professional Responsibility](#) database), and electronic resource collections (*e.g.*, [Cornell American Legal Ethics Library](#) and the [ABA Center for Professional Responsibility](#)). In my view, the AALS Section of Professional Responsibility webpage shouldn't attempt to supplant these other resources, but should supplement them.

I envision an AALS Section on Professional Responsibility website that will serve as our institutional memory *and* as a useful resource aggregator. I also hope – for those

of us too shy to participate actively in blogs – that it can serve as a way for many of us to find communities of interest and to make connections outside the setting of the AALS annual meeting.

While our Section's new AALS website isn't the most attractive website in the world, I hope you will find it functional. We have included items that we hope you will find useful and welcome your ideas about other items we could include. We have "archive" folders that can help us create an institutional memory. Our archives already include past Section newsletters, Annual Meeting programs and posters, and past tables of contents from the ABA's annual ethics conference. Some of the "archive" folders are still empty, but we hope to fill them with content in the future. For example, I hope that some of the past Section chairs might submit comments for this folder, especially those who chaired the Section during its first decade.

But the webpage is more than a repository of our history. The website has a "calendar" function that allows us to post upcoming conferences of interest. (We're waiting for a "button" but in the meantime send your calendar items to LTerry@psu.edu.) One folder includes links to past PR conferences that still have online materials available. We have asked the authors of general-purpose PR course books to prepare a summary of their book; these summaries have been consolidated in a single pdf document. While this compilation may be of interest to many of us, it should be especially useful for teachers new to the field. Teachers new to the field may also find it useful to consult the webpage's listing of leading resources, list-servs and blogs. The webpage also lists the Section's current committees; please contact us if you

would like to volunteer to help out on a project. In the future we plan to prepare a compilation of "specialty" ethics books and create an inventory of existing specialty ethics courses (with relevant contact information in case you want to teach one of these courses).

The AALS' new web platform has two types of list-servs. Everyone who has joined the PR Section is a member of the "announcements" list-serv unless you opt out. We will use this list-serv sparingly for things such as distribution of the newsletter, annual meeting announcements, and items of that sort. The second kind of list-serv is a "discussion" list-serv. **You need affirmatively to opt into the Section's discussion list-serv on the Section's webpage; we'd like to encourage you to do so.**

One of the functions available through the new website is the ability to conduct a "Survey" among those who have opted into the "Discussion Listserv." Margaret Raymond chairs that committee, which is working closely with the new teacher outreach committee chaired by Andy Perlman. These groups will be circulating a survey in the near future, which I encourage all of you to complete. Our section has 870 members this year, which I found very surprising. We are interested in learning more about all of you and about Professional Responsibility courses at your school.

In sum, I am very pleased to serve as Chair of the Section during this exciting transition. I hope that we will use the new webpage in interesting and creative ways. I encourage all of you to call me at (717) 240-5262 with your ideas and suggestions or email them to me at LTerry@psu.edu.

Laurel

AALS PROFESSIONAL RESPONSIBILITY SECTION ANNOUNCEMENTS

CALL FOR PAPERS FOR THE PROGRAM OF THE SECTION OF PROFESSIONAL RESPONSIBILITY AT THE 2010 AALS ANNUAL MEETING IN NEW ORLEANS, JANUARY 8, 2010, 10:30-12:15

The AALS Section on Professional Responsibility is issuing a call for papers to select one speaker to participate in its 2010 AALS Annual Meeting program. This program will be held in New Orleans on Friday, Jan. 8, 2010, from 10:30-12:15pm. The paper should address the program topic, which is ***“The Transformative Effect of International Initiatives on Lawyer Practice and Regulation: A Case Study Focusing on the FATF & its 2008 Lawyer Guidance.”*** (The theme for the annual meeting itself is “transformative law.”)

Even if you have never heard of the FATF or its October 2008 Lawyer Guidance, **please don’t rule yourself out of this call for papers - you are in good company!** One reason why we selected this topic for the Annual Meeting program is our belief that few legal ethics scholars (or other scholars) are aware of the FATF’s legal profession gatekeeper initiatives, even though they have the potential to implicate the lawyer-client relationship in significant practice areas and are likely to change, in some significant ways, the manner in which these U.S. lawyers practice. See *Risk-Based Approach Guidance for Legal Professionals* (Oct. 23, 2008)[FATF 2008 Lawyer Guidance], <http://www.fatf->

gafi.org/dataoecd/5/58/41584211.pdf; Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk Based Approach for Transactional Lawyers*, 43 *REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL* 607 (2009).

The speakers in Part 1 of this program include U.S. lawyer Kevin Shepherd and U.K. lawyer Colin Tyre, who are among the handful of lawyers who were primarily responsible for handling the negotiations with the FATF during the last 18 months leading up to the October 2008 FATF Lawyer Guidance. They will address the history and negotiating dynamics that led to the *FATF 2008 Lawyer Guidance*, explain how it is being implemented in the U.S., and will address its implementation in other countries (some of whom now have ethics rules or laws implementing FATF principles). The speakers in Part 2 of the program come from different disciplines and will offer their reflections on these FATF lawyer gatekeeper developments. The speakers include Professors Tom Morgan, a leading legal ethics and antitrust expert, Ellen Podgor, who is a white collar crime expert and the author of the white collar crime blog, and James Gathii, whose area of expertise includes international commercial (and comparative) law. Laurel Terry will moderate the panel. The fourth panelist in Part 2 will be chosen by this ***Call for Papers***. We invite you to review the ***FATF 2008 Lawyer Guidance*** and submit a brief paper that contains your reflections about the significance of these FATF developments, their likely influence in the future, the extent to which they represent a transformative change in law-making or lawyer regulation, the increasing role of gatekeeper initiatives and international

initiatives in U.S. lawyer regulation, or any other aspect of interest.

If you would like more information before responding to the “call for papers,” please email Laurel Terry at LTerry@psu.edu. We have a four page “briefing paper” with additional information and resources that we can email to you.

If you would like to be considered for the panel via this “call for papers,” please submit a 3-5 page (double-spaced) summary of your proposed remarks. The deadline is **September 1, 2009** and submissions should be sent to Professor Laurel Terry, Penn State Dickinson School of Law, LTerry@psu.edu. She will forward the submissions (without names) to the committee reviewing the submissions. The Section will notify the AALS of the selected speaker by October 1, 2009; the selected speaker will be notified shortly afterwards. Panelists are eligible as long as their papers are not in print before the January 8, 2010 AALS Annual Meeting. (The paper may be accepted for publication.) The AALS will distribute at the Annual Meeting a publication that announces the speakers selected by a “Call for Papers.” The AALS also has a section on its website where it can post the papers from the “Call for Papers.”

**ACTIVITIES IN CONJUNCTION WITH
THE 35th ABA NATIONAL
CONFERENCE ON PROFESSIONAL
RESPONSIBILITY AND 25TH
NATIONAL FORUM ON CLIENT
PROTECTION**

The ABA Center for Professional Responsibility invites you to attend the 35th National Conference on Professional Responsibility. The Conference will be held on May 27-30, 2009, at the Fairmont Hotel

in Chicago, IL. The Conference is held in conjunction with the 25th National Forum on Client Protection.

The conference has been described as “the preeminent educational and networking opportunity in the field of ethics and professional responsibility with leading experts, scholars and practitioners from across the country.” Conference topics address recent trends and developments in legal ethics, professional discipline for lawyers, professionalism, and practice issues. In addition, this year our Section has taken a leadership role in two events held in conjunction with the conference.

Academics’ Roundtable

The first is the Academics’ Roundtable to be held on Friday May 29th from 1:30 to 3:30. Members of the AALS Section on Professional Responsibility can participate in the Roundtable without paying a registration fee, and, therefore, academics, who live in the Chicago area or will be in the area on the 29th are particularly invited to attend. This year’s roundtable will focus initially the works of three scholars:

Sarah M. R. Cravens, Associate Professor of Law at the C. Blake McDowell Law Center of the University of Akron School of Law, will discuss “Shifting Dynamics of Judicial Ethics in Mass Litigation” (Sarah can be reached at cravens@uakron.edu or (330) 972-2332);

Paula Schaefer, Associate Professor of Law at the University of Tennessee College of Law, will discuss “Clawbacks, Quick Peeks, and Confidentiality” (Paula can be

reached at (865) 974-6793 or pschaefe@tennessee.edu); and

Susan Saab Fortney, the Paul Whitfield Horn Professor at the Texas Tech University School of Law, will discuss "Examining and Supporting Empirical Research on Legal Ethics" (Susan can be reached at (806) 742-3990 ext. 233 or SUSAN.FORTNEY@ttu.edu).

For more information on the Roundtable, please contact Carol Needham at needhamc@slu.edu and include "Roundtable" in the subject line.

Academics' Dinner

In addition, the Professional Responsibility Section of the AALS and the John Marshall Law School are delighted to invite you to the informal "academics dinner" at this month's ABA National Conference on Professional Responsibility in Chicago. The dinner will be on Friday, May 29 at 7:45 at the Cantina section of the [Italian Village Restaurant](#) located at 71 W. Monroe, Chicago (312.332.7005). We have a fairly large private room so there should be room to move around and socialize with old friends and meet new ones. Space is limited so please RSVP as soon as possible to Alberto Bernabe at 7bernabe@jmls.edu. Again, one need not register for the conference to attend the dinner, and significant others also are welcome to attend. (If you already replied to an earlier email about this dinner, you do not need to do so again.)

SECTION REFLECTIONS ON THE PASSING OF FORMER CHAIR MARY DALY

It is with great sadness that the Section announces the passing of former Section Chair and Saint John's Dean Mary Daly. Current Section Chair Laurel S. Terry described Dean Daly as "a scholar who was a pioneer and a giant in the field and whose work will be relied upon long beyond her untimely death." Professor Terry added that Dean Daly's "dedication to family, community, and the legal profession will be deeply missed."

Dean Daly has been awarded the 2009 Michael Franck Professional Responsibility Award and will receive the award posthumously at a luncheon on Thursday, May 28, 2009 at the National Conference on Professional Responsibility in Chicago. Registered Conference attendees are invited to attend the luncheon at no additional fee.

In recognizing Dean Daly's lifetime of achievements and dedication to legal ethics, the ABA noted

Ms. Daly served as Dean and John V. Brennan Professor of Law and Ethics at St. John's University School of Law from 2004 until her death in November 2008. Prior to that, she was the James H. Quinn Professor of Legal Ethics at Fordham University School of Law and served as the director of the law school's graduate program and the co-director of its Louis Stein Center for Law and Ethics. She originally joined the faculty of Fordham in 1983. Earlier in her career she practiced law with the New York law firm of Rogers & Wells and also served as an assistant United States Attorney in the Southern District of New York.

In the early 1990's, Ms. Daly was instrumental in helping to cultivate academic work in legal ethics by gathering together law professors attending the ABA's annual National Conference on Professional Responsibility to discuss teaching and scholarship projects. This tradition is still carried on today. Her scholarly writings and publications focused on corporate, comparative and cross-border practice, multidisciplinary partnerships and comparative approaches to professional responsibility. She was a frequent speaker at CLE programs and events both nationally and internationally.

Ms. Daly served as the Reporter for the ABA Commission on Multidisciplinary Practice from 1998-2000; a member of the ABA Standing Committee on Professional Discipline from 2001-2004; and on the Editorial Board of the ABA/BNA Lawyers' Manual on Professional Conduct. She was active in the ABA Section of Legal Education and Admissions to the Bar, the Association of Professional Responsibility Lawyers, the New York State Bar Association, the Association of the Bar of the City of New York and the Federal Bar Council Foundation.

For all her activities and accomplishments, it was, in fact, her grace and style that most marked Dean Daly. As Professor Bruce Green, another former Section chair and a co-director with Dean Daly of Fordham's Louis Stein Center for Law and Ethics, so aptly put it,

It is impossible to paint the full picture of Mary Daly's contributions to legal ethics and professionalism, because much of what she contributed was a product not of what she accomplished but of who she was. Mary was a consensus-builder as a bar leader and law school administrator, and a community-builder in all aspects of her academic and professional work. She was a model of openness, self-sacrifice, hard work, intellect, and grace. She was a friend and role model to junior colleagues and a supportive and inspirational peer. Her imprint upon them and the profession generally, and the people we serve, will be a lasting one."

OTHER PROFESSIONAL ANNOUNCEMENTS AND OPPORTUNITIES

JOURNAL OF THE PROFESSIONAL LAWYER

The Journal of The Professional Lawyer, an annual publication of the ABA Center for Professional Responsibility, is looking for articles for its 2009 Edition, to be published in the fall. Questions and submissions should be directed to Art Garwin at agarwin@staff.abanet.org

INTERNATIONAL LEGAL ETHICS CONFERENCE IV

Deborah Rhode and Dena Evans of Stanford's Center on the Legal Profession invite you to save the date for the fourth International Legal Ethics Conference, July

15-17, 2010, at Stanford University in Palo Alto, California. For more information or to join the Center's email list, contact legalprofession@law.stanford.edu

FREE CENTER FOR PROFESSIONAL RESPONSIBILITY MEMBERSHIPS

The ABA Center for Professional Responsibility is offering a free one-year membership (\$100 value) to ABA members who are new to teaching professional responsibility (adjunct or regular). This is an opportunity to learn about the Center and its many resources including online "members-only" access to an ABA formal ethics opinion library and to articles and papers. Also receive a subscription to *The Professional Lawyer* magazine and the Center's annual *Journal*; revised editions of the *ABA Model Rules of Professional Conduct*; e-mail notices of news and policy developments; and discounts to our CLE events and publications.

If you've taught professional responsibility for less than two years, are an ABA member, and would like to enjoy a complimentary one-year membership in the Center, send a request including your teaching history and ABA membership information to cpr@abanet.org.

RECENT DEVELOPMENTS IN THE LAW OF LAWYERS

By Roy Simon
(Howard Lichtenstein Distinguished
Professor of Legal Ethics, 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

Several ABA developments have occurred during the past year or are on the agenda for the coming year.

ABA Model Rules of Professional Conduct: The ABA has approved a landmark amendment to ABA Model Rule 1.10. At the ABA's August 2008 Annual Meeting, the ABA House of Delegates had voted 192-191 to table debate on various proposed screening provisions in ABA Model Rule 1.10. After that shot across the bow, the ABA Standing Committee on Ethics and Professional Responsibility went back to work and revised its proposal. In February, the ABA House of Delegates resumed the debate and this time approved a screening provision in Rule 1.10. The amended rule, including the screening provision, provides (in legislative style) as follows:

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), (or (b)), and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening

procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current

government lawyers is governed by Rule 1.11.

The House of Delegates also approved four new paragraphs in the Comment to Rule 1.10 (numbered 7 through 10) and renumbered former Comments 7 and 8 as Comments 11 and 12 (leaving the text of those comments unchanged). For the Recommendation and Report submitted to the ABA in support of the amendments, see <http://www.abanet.org/cpr/ethics/screening.html>.

However, Rule 1.10 is apparently still a work in progress. When the ABA Standing Committee on Ethics and Professional Responsibility presented the proposal to the House of Delegates, its stated goal was to enable law firms to avoid firm-wide imputation of conflicts of interest imported by lateral attorneys by erecting timely and effective screens. Unfortunately, the screening provision now on the books, when read literally, appears to permit screening to substitute for a former client's consent in all circumstances, not just when a lateral attorney is hired. In other words, amended Rule 1.10 appears to allow a firm to sue its own former client in a substantially related matter, without obtaining client consent, as long as the firm screens off the lawyers who worked on the former client's matter. The Standing Committee on Ethics and Professional Responsibility did not intend that result, so it recently asked the ABA's Rules and Calendar Committee to adopt a housekeeping amendment to Rule 1.10 making clear that the screening provision applies only to conflicts imported by laterals. Andy Perlman (Suffolk) reported on the blog at www.legalethicsforum.com that the ABA's Rules and Calendar

Committee rejected that request. (See Perlman's April 8, 2009 post.) That leaves two main options. One option is for the Standing Committee to ask the House of Delegates to formally amend Rule 1.10 again in August to achieve the original goal. The other option is for the Standing Committee to issue a formal opinion that interprets Rule 1.10 to apply only to laterals.

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. For the first time in recent memory, however, no new proposed amendments are circulating to the Federal Rules of Civil Procedure, the Federal Rule of Criminal Procedure, or the other federal rules that are periodically revised. (A slew of approved amendments were approved by the Supreme Court on March 26, 2009 and were transmitted to Congress in accordance with the Rules Enabling Act, and will take effect on December 1, 2009, unless Congress enacts legislation to reject, modify, or defer the – but none of them appear to bear on legal ethics.)

For official updates, new proposals, and background information regarding federal rules, visit the official website 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.

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 2008 PR Newsletter, Alaska and New York have comprehensively amended their ethics rules, and Kentucky has announced comprehensive amendments that will take effect during 2009. Looking at the aggregate national picture, since the Ethics 2000 Commission released its final report in 2001, an impressive 41 jurisdictions have significantly revised their rules (AL, AK, AZ, AR, CO, CT, DE, DC, FL, ID, IN, IA, KS, KY, LA, MD, MN, MS, MO, MT, NE, NV, NH, NJ, NC, ND, NM, NY, OH, OK, OR, PA, RI, SC, SD, UT, VA, WA, WI, WY); 7 states have circulated proposed rules that remain pending (CA, IL, MI, TN, TX, VT, WV); and 3 states have appointed review committees that have not yet issued their reports (GA, HI, MA). 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, 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 24 states require some form of

malpractice insurance disclosure, either on their bar registration statements (19 states -- AZ, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, ND, RI, VA, WA and WV) or directly to clients (5 states -- AK, NH, OH, PA and SD). At least 5 additional states (CA, NY, TX, UT & VT) are actively considering some form of legal malpractice disclosure rule (though the Texas Bar has recommended against it – see below). So far, only four states (AR, CT, FL, and KY) have expressly 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.

For detailed information about developments in particular states, visit the websites 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. Here are highlights of the recent state-level developments that I came across – and I’m sure there are more out there that I missed, so please let me know by emailing me at roy.simon@hofstra.edu.

Alabama

(www.judicial.state.al.us/rules): On December 11, 2008, effective immediately, the Alabama Supreme Court adopted a new Rule 6.5 (“Nonprofit and Court-Annexed Limited Legal Services Programs) based on ABA Model Rule 6.5, and a new Rule 6.6 (“Special Membership for Pro Bono Services”) with no ABA equivalent. Rule 6.5 permits any inactive member of the Alabama State Bar to render pro bono services by paying special membership dues and becoming a special member of the

Alabama State Bar for the year in which the pro bono services are rendered.

Alaska (www.state.ak.us/courts): Comprehensively amended Alaska Rules of Professional Conduct took effect on April 15, 2009. The full text of the new rules, with commentary explaining the nature of Alaska's changes, is available at www.state.ak.us/courts/rules.htm#4.

Arizona (www.azbar.org): A new rule for registration of in-house lawyers took effect on January 1, 2009, and a new rule for admission on motion will take effect on January 1, 2010. Arizona's pro hac vice rule has also been amended. The new in-house registration rule allows out-of-state lawyers in good standing to perform legal work other than litigation for an organizational employer, provided the in-house lawyers pay bar dues and file an annual registration statement. The full package of amendments 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): The State Bar of California's Commission for the Revision of the Rules of Professional Conduct has been comprehensively reviewing California's unique rules since 2001 to make them more like the ABA Model Rules. The Commission has issued 45 draft rules so far, in three batches (2006, 2007, and 2008), but none since the Spring 2008 PR Newsletter. In the meantime, to encourage lawyers and law firms to meet the rising demand for pro bono assistance during the economic downturn, the California State Bar is circulating a proposed new Rule 1-650 for

public comment. The new rule, which is similar to ABA Model Rule 6.5 ("Nonprofit and Court-Annexed Limited Legal Services Programs") would apply 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. The comment period expires on May 19, 2009.

Regarding the disciplinary process, in March of 2009 the State Bar Board of Governors circulated for public comment a proposal to permanently disbar any attorney who is disbarred twice. The new proposal is milder than a 2006 proposal that would have imposed permanent disbarment for particularly egregious misconduct. In 2007 the Supreme Court rejected that proposal and asked for a narrower one. The Board also proposes that lawyers who seek reinstatement after a first disbarment or resignation must pass the California bar exam. Comments are due by May 19th.

In February of 2009, the California Law Revision Commission issued a 40-page report and recommendation entitled "Attorney-Client Privilege After Client's Death." The report was mandated by a 2007 law, 2007 Cal. Stat. ch. 388, § 2 (AB 403), that required the Commission to study the attorney-client privilege after death and report its findings to the Legislature by July 1, 2009. Observers had speculated that the Commission would recommend amendments to California Evidence Code §954 (Lawyer-Client Privilege) and §955 (When Lawyer Required to Claim Privilege), but instead the Commission recommended that California preserve the

general approach of existing California law, with two minor adjustments to clarify existing law.

Connecticut (www.ctbar.org): On February 23, 2009, the Connecticut Superior Court Rules Committee 23 voted unanimously to reject a proposed rule that would have required lawyers to disclose to their clients whether they carry malpractice insurance. The committee did not explain its reasoning. The rejection is especially interesting because the proposal was introduced by the Chair of the Rules Committee, Connecticut Supreme Court Justice Peter Zarella.

Florida (www.flabar.org): An amended version of Rule 4-5.5, Florida's MJP rule, took effect on January 1, 2009. The amendment added a new subsection (b)(3), which provides that lawyers not admitted in Florida may not "appear in court, before an administrative agency, or before any other tribunal" unless authorized to do so by the applicable rules of those tribunals. The amended rule is online at www.floridasupremecourt.org/decisions/2008/sc07-1844.pdf.

On February 27, 2009, in *In re Amendments to the Rules Regulating the Florida Bar—Rule 4-7.6, Computer Accessed Communications*, the Florida Supreme Court rejected a February 26, 2008 petition by the Florida Bar to amend Rule 4-7.6, which governs websites, electronic mail, and other computer-accessed advertisements. The proposed amendments would have allowed website content other than the home page to include client testimonials, quality claims, and results obtained, subject to certain qualifications. The bar also proposed that

the websites be exempt from the filing and review requirements that apply to other types of lawyer advertising. In rejecting the proposals and returning them to the Bar for further study, the court wrote four separate opinions, all of which indicated that lawyer websites should generally be subject to the same ethics rules that apply to other forms of lawyer advertising.

The Florida Supreme Court is still considering the Florida Bar's October 8, 2008 petition proposing various changes to the Florida Rules of Professional Conduct. Most of the proposed changes are minor (e.g., adding headings or clarifying phrases), but the proposals would also modify Rule 4-3.3 to conform to the 2002 changes to ABA Model Rule 3.3, and add language to Rule 4-1.5 requiring that nonrefundable fee arrangements be confirmed in writing. A proposed amendment to Rule 4-7.2(c) provides: "*Prohibited Sounds*. A lawyer shall not include in any advertisement or unsolicited written communication any sound that is deceptive, misleading, manipulative, or that is likely to confuse the listener." (An addition to the Comment explains that this "precludes, for example, the sound of sirens or car crashes.") This would liberalize Florida's existing advertising rules – Rule 4-7.5(b) currently prohibits "any background sound other than instrumental music."

In April, the Florida Board of Bar Examiners Character and Fitness Commission issued a final report studying admissions standards for eight months. This was the first review of Florida admissions standards in 15 years. The Commission recommends that a convicted felon should never be admitted to the bar. (Currently,

Rule 2-13.3 provides that a person who has been convicted of a felony is not eligible to apply until the person's civil rights have been restored.) The Commission also 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). The Commission is also considering whether to expand its current review of online personal websites (like Facebook and MySpace), and is contemplating adding a question to the bar application requiring that bar applicants must list all personal websites and grant the bar examiners access to them.

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 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.

Louisiana (www.lsba.org): The Louisiana Supreme Court has again postponed the effective date of new rules governing lawyer advertising. 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 set for December 1, 2008, but in September of 2008, Public Citizen and two Louisiana personal injury firms filed a lawsuit challenging various provisions of the new rules on First Amendment and Due Process grounds -- see *Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, (E.D. La., No. 2:08-cv-04451-MLCF-JCW) (reported at 24 Law. Man. Prof. Conduct 523). The complaint is on Public Citizen's website at www.citizen.org/documents/louisiana_complaint.pdf. (Some of the challenged Louisiana provisions are identical to New York advertising provisions that a New York federal district court struck down in 2007 and that the New York courts have since adopted anyway as part of the new New York Rules of Professional Conduct.) Last October, in response to the suit, the Louisiana Supreme Court issued an order pushing back the effective date to April 1, 2009 because "to compel compliance with the new rules before the constitutional issues are resolved would be prejudicial to those lawyers attempting to comply with the rules while others are resisting compliance." In November, another personal injury lawyer filed suit raising First Amendment and Due Process challenges to the new rules -- see *Wolfe v. Louisiana Attorney Disciplinary Bd.*, E.D. La., No. 08-4994. On February 18, 2009, the Supreme Court issued an order deferring implementation of the new rules until October 1, 2009 to allow the Louisiana State Bar Association and the court to further study certain rules in light of the constitutional challenges that have been raised.

Finally, effective January 1, 2009, the Louisiana Supreme Court amended Louisiana Supreme Court Rule XVII,

Section 3(B) to permit qualified foreign nationals to be admitted to the bar in Louisiana even if they are not permanent residents of the United States. The rule previously required that every applicant to the Louisiana bar be a citizen or resident alien of the United States. The modified rule provides that an applicant must be a citizen of the United States “or an alien lawfully admitted for permanent residence, or an alien otherwise authorized to work lawfully in the United States.”

Maine

(www.courts.state.me.us/court_info/rules/rules.html): Effective August 1, 2009, Maine has adopted new Rules of Professional Conduct that use the format and numbering system of the ABA Model Rules of Professional Conduct. 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.mebareverseers.org/ethicsweb/ethicsmain.html.

One rule change apparently couldn’t wait until August 1st. Maine has a number of court-connected legal assistance programs that provide free advice and representation to unrepresented individuals at court proceedings. Effective February 17, 2009, Maine amended its solicitation rule, Rule 3.9(f), to allow lawyers who participate in these programs to announce their availability to provide assistance before the

start of and during court proceedings. (The Advisory Note is clearer than the actual rule amendment.)

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 to the Missouri Bar Board of Governors. The proposed rules and all comments from the Bar are posted on the Bar’s website.

New Jersey

(www.judiciary.state.nj.us/rules/apprprc.htm): The biggest recent New Jersey development was the Supreme Court’s decision, in *In re Opinion 39 of the Committee on Attorney Advertising* (N.J., Dec. 17, 2008), vacating the Advertising Committee’s disapproval of the “Super Lawyers” and “Best Lawyers” designations and referring the matter jointly to the

Advisory Committee on Attorney Advertising, the Advisory Committee on Professional Ethics, and the Professional Responsibility Rules Committee “for expedited review and modification of RPC 7.1(a)(2) and (3).” The review of those rules is still pending.

On January 5, 2009, effective immediately, the New Jersey Supreme Court amended Rule 7.1(b), which makes it “unethical for a lawyer to use an advertisement ... known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19A-3(d).” At the same time, the court amended Rule 7.5(a), which governs trade names.

On February 26, 2009, *In re CAA 47-2007*, (N.J. Feb. 26, 2009), the New Jersey Supreme Court ordered its Committee on Attorney Advertising to solicit public comments on trade names and to examine whether the court should amend Rule 7.5, which restricts the use of trade names. The issue arose when a lawyer who runs a divorce mediation practice challenged the Advertising Committee’s application of that rule on First Amendment grounds. The Supreme Court said that before it could resolve the critical First Amendment issues, it needed a more detailed record of the issues and arguments relating to trade names.

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.

Finally, on April 6, 2009 the Committee on Attorney Advertising closed the public comment period on a proposed new Advertising Guideline that would prohibit an attorney or law firm from including, on a website or other advertisement, “a quotation from a judge or court opinion (oral or written) regarding the attorney’s abilities or legal services.” The Committee proposed the new Guideline after reviewing an attorney’s website that included two quotations from unpublished opinions on fee petitions in which judges praised the attorney’s legal abilities.

New Mexico (www.nmbar.org):
The New Mexico Rules of Professional Conduct were comprehensively amended effective November 3, 2008. It took me over half-an-hour, however, to find the new rules, which I could not find even on the page headed “Recently Approved Rule Changes.” (That page says twice that it contains rule changes approved by the Supreme Court “on or after 12-31-2999.” Very clairvoyant. But it would be nice if New Mexico lawyers could quickly find the ethics rules they must obey in *this* millennium.)

On January 14, 2009, New Mexico approved a new Rule 15-301.2 (“Legal services provider limited law license for emeritus and

non-admitted attorneys”) authorizing the clerk of the Supreme Court to issue a limited three-year license (renewable once) to a qualified “emeritus attorney” or “non-admitted attorney.” (An “emeritus attorney” is basically any inactive member of the Bar in good standing in New Mexico or any other jurisdiction who has practiced for at least 20 years. A “non-admitted attorney” is any non-New Mexico U.S. lawyer who is in good standing in all states in which the person is admitted and has practiced for at least three years.) The limited license allows representation of legal services clients referred by a qualified legal services provider. To obtain this limited license, the applicant must supply a sworn statement that he “has not been the subject of disciplinary action by the bar or courts of any jurisdiction in the five (5) years preceding the applicant’s retirement from the practice of law.”

New York (www.nysba.org and www.courts.state.ny.us): New York’s courts have finally adopted the New York Rules of Professional Conduct, which took effect on April 1, 2009. (New York is the last jurisdiction to abandon the format of the old ABA Model Code of Professional Responsibility.) The new New York rules use the numbering and a lot of the language of the ABA Model Rules of Professional Conduct, but also retain numerous provisions from the New York Code of Professional Responsibility (which was based largely on the old ABA Model Code). Also on April 1st, the New York State Bar Association’s Committee on Standards of Attorney Conduct (COSAC) posted a full set of Comments to the new rules on the State Bar’s website. The Comments, which were provisionally approved in 2007, were modified to conform to the language of the

rules as adopted, which differed significantly from the rules as proposed. The Comments are not adopted or approved by the courts, but they do not require any further action by the State Bar’s House of Delegates.

Meanwhile, on January 22, 2009, the Second Circuit heard oral argument in the appeal from *Alexander v. Cahill*, 2007 WL 2120034 (N.D.N.Y., June 23, 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 retain all of the old advertising rules essentially verbatim, including the provisions that were declared unconstitutional.

Tennessee (www.tba.org): The Tennessee Supreme Court has a lot on its plate, and will soon have more. In June of 2008, the Tennessee Bar Association filed a petition with the Tennessee Supreme Court seeking to expand and encourage pro bono work. The proposals recommend that the court adopt a new Rule 6.5, permit pro bono work by registered in-house counsel, amend Rule 6.1 to set an aspirational standard of fifty pro bono hours per year, and require annual reporting of pro bono hours.

Also in June of 2008, the Tennessee Bar Association filed a petition with the Tennessee Supreme Court recommending that Tennessee adopt ABA Model Rules 5.5 and 8.5 (permitting multijurisdictional practice), thus adding Tennessee to “the broad movement of jurisdictions permitting, but expressly and intelligently regulating, the multijurisdictional practice of law.” On

December 10, 2008, the Supreme Court circulated the proposed rules for public comment and set a March 9, 2009 comment deadline.

Also in December of 2008, the Supreme Court circulated for public comment a proposed new court rule, § 10.01, entitled “Registration of In-House Counsel.” The proposed rule is based on the ABA Model Rule for Registration of In-House Counsel, which the ABA adopted in August of 2008. The comment deadline was March 9, 2009.

Finally, In June of 2008, after more than two years of work by the Bar’s Standing Committee on Ethics & Professional Responsibility, 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. The comment deadline was August 15, 2008. The proposals, which represent the first thorough examination of the rules since their adoption in March 2003, suggest changes in about twenty significant areas, including client consent, confidentiality, conflicts, client files, and public statements by prosecutors. The proposals are available at www.tba.org/ethics/index.html.

Texas (www.texasbar.com): In May of last year, 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 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

information should be posted on the State Bar’s web site. On June 26, 2008, the Texas State Bar’s Board of Directors forwarded the Task Force’s recommendation to the Texas Supreme Court, which has not yet acted on the recommendation.

Meanwhile, on March 9, 2009, a bill (H.B. 2825) was introduced in the Texas legislature that would require the Texas Supreme Court to adopt an insurance disclosure rule for lawyers by December 1, 2009. The rule must require 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 17th the bill was referred to the House Judiciary & Civil Jurisprudence Committee.

Virginia (www.vsb.org): Virginia is one of the most active and vigilant jurisdictions regarding the rules regulating lawyers and the legal profession, and its website is extraordinarily informative and up to date. This is just a sampling of Virginia developments.

Effective May 1, 2009, the Virginia Supreme Court has restructured the rules and procedures governing its disciplinary system – see Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia, entitled “Procedure for Disciplining, Suspending and Disbarring Attorneys.”

Effective March 1, 2009, Virginia has adopted amendments to Rules 5.5 and 8.5. The amended rules are generally patterned

on the equivalent ABA Model Rules but feature some significant differences. For example, Virginia's Rule 5.5 expressly applies to lawyers' licenses in other countries, and does not include a paragraph relating to in-house lawyers. However, effective January 1, 2009, the Virginia Supreme Court also adopted a new Supreme Court Rule 1A:7 governing certification of foreign legal consultants.

Proposed changes to Rules 1.9 and 1.11 of the Rules of Professional Conduct, which were approved on March 1, 2008 by the Virginia State Bar Council, remain pending before the Virginia Supreme Court.

At its June 18, 2009 meeting, the Virginia State Bar Council is expected to consider a proposed amendment to Rule 1.17(a), which allows a lawyer to sell all or part of a practice. The proposed amendment will permit a seller to continue to practice law in the geographic area in areas of the practice that have *not* been sold.

At its June 18th meeting, the Virginia State Bar Council also is expected to consider a proposal to ask the legislature to increase the penalty for certain types of UPL to that of 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 February 26, 2009, the Virginia Supreme Court rejected the Bar's 2006 petition (revised in 2007) to amend the Comment to Rule 8.4 of the Virginia Rules of Professional Conduct. The proposed amendments would have provided guidance

regarding when a lawyer (or an agent under the lawyer's direction or control) could ethically engage in lawful, undisclosed or non-consensual recording of communications in which the lawyer or agent is a participant.

The Virginia Supreme Court has 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 of the amendment reason, such organizations lack the rigorous requirements set forth in the ABA accreditation process. Comments are due on May 9, 2009.

The Supreme Court is still considering a July 2008 proposal to adopt a "Katrina rule" to govern Provision of Legal Services Following Determination of Major Disaster. The proposal generally follows the ABA Model Court Rule on this subject, with a few modifications.

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Note, *Organizational Citizenship Through Talent Management: An Alternative Framework to Diversity in Private Practice*, 42 COLUM. J.L. & SOC. PROBS. 43 (2008).

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Note, *A Shakeup for the Duty of Confidentiality: The Competing Priorities of a Government Attorney in California*, 41 LOY. L.A. L. REV. 701 (2008).

Note, *The Costs of Waiver: Cost-Benefit Analysis as a New Basis for Selective Waiver of Attorney-Client Privilege*, 83 N.Y.U. L. REV. 1248 (2008).

Note, *No Good Deed Goes Unpunished: The Impact of New Jersey Court Rule 4:42-9(a)(3) on Attorney Fees in Estate Litigation*, 60 RUTGERS L. REV. 769 (2008).

Note, *Globalization's Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235 (2008).

Note, *Corporate Attorney-Client Privileges and Work-Product Protections Should Absolutely be Preserved*, 70 U. PITT. L. REV. 155 (2008).

Note, *Brady Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935 (2008).

Note, *Refocusing the Lens of Child Advocacy Reform on the Child*, 86 WASH. U. L. REV. 481 (2008).

SYMPOSIUM

Symposium, *Discussing David Luban's Legal Ethics and Human Dignity*, 93 CORNELL L. REV. 1285 (2008).

Symposium, *Lawyers, Law Firms & the Legal Profession: An Ethical View of the Business of Law*, 6 DEPAUL BUS. & COM. L.J. 483 (2008).

Symposium, *Reforming Criminal Indigent Defense in Louisiana*, 9 LOY. J. PUB. INT. L. 111 250 (2008).

Symposium, *Lawyers With Disabilities*, 69 U. PITT. L. REV. 389 (2008).

Symposium, *The Formation of an Ethical Professional Identity in the Peer-Review Professions*, 5 U. ST. THOMAS L.J. 361 (2008).

Symposium, *New Directions in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 1 (2008).

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