PROFESSIONAL RESPONSIBILITY SECTION
FALL 2007 NEWSLETTER

Section Chair: Russell G. Pearce, Fordham University, 140 West 62nd Street, New York, NY 10023, 212-636-6834, e-mail rpearce@law.fordham.edu.

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

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

Production Designer: Paula M. Heider, Widener University, 3800 Vartan Way, P.O. Box 69382, Harrisburg, PA 17106-9382, 717-541-3949, e-mail pmheider@widener.edu.

FALL 2007

MESSAGE FROM THE CHAIR REGARDING PROPOSED AMENDMENT TO THE SECTION BYLAWS

By Russell G. Pearce

[This column ran in our special fall bulletin announcement and is repeated here just in case anyone missed it.]

At our business meeting on January 3, 2008, the Executive Committee will propose a Bylaws Amendment. The Amendment would create the position of Secretary as an officer; increase the number of Executive Committee members to twelve in addition to the three officers; and increase the term for Executive Committee members from two years to three years.

Given the large membership of our section, we would like to include more members on the Executive Committee. At the same time, in order to promote continuity and institutional memory, we propose lengthening the term of Executive Committee members from two to three years. In addition, the Executive Committee has found it necessary to create the position of Secretary to take and distribute the minutes from our meetings. We propose making this position an office recognized in the bylaws.

The text of the proposed amendment is submitted below. Please feel free to email me with any questions or comments.

Resolved that Article III of the Bylaws be amended as follows (strike-outs indicate deletions, bracketing indicates additions):
:

Article III. Officers, Committees

Section 1. Officers. The officers of this section are the chairperson[,] ~~and~~ the chairperson-elect, [and the secretary.] The chairperson-elect shall be elected at each annual meeting of the Association, shall qualify by acceptance and shall succeed to the office of chairperson at the close of the next annual meeting. [The secretary shall be elected for a two-year term at every other annual meeting.]

Section 2. The Executive Committee.

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

(1) [The three members elected at]~~At~~ the annual meeting in ~~2003~~ [2008]~~,~~ ~~three members will be~~ [shall be deemed to be] elected to a ~~one~~ [three~~–~~] year term ~~and three members will be elected to a two year term~~. [Following enactment of these bylaws, the Executive Committee shall fill the vacancies pursuant to (2) below with one member to serve a three-year term, four members to serve a two-year term, and four members to serve a one-year term.] Thereafter all members will be elected to a ~~two~~ [three] year term.

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

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

RESPONSE TO THE CHAIR'S COLUMN ON LEGAL ETHICS

[This year Section Chair Russ Pearce has used the Chair's Column to initiate a dialogue among practitioners and academics about the future of legal ethics. In the final newsletter during his term, we offer a final installment in what has been a thought-provoking discussion. This installment is from Frederick C. Moss, Associate Professor of Law at the Dedman School of Law, Southern Methodist University.]

I've taught Legal Ethics continuously from its academic infancy in 1978. I, like Mr. Pera, am somewhat baffled at Russ Pearce's observation that Legal Ethics is becoming devalued in legal academia. Far from beginning to wither, I see it continuing to be considered a serious and important field of academic study. I have not seen nor heard of any school where the faculty is considering cutting back on its "professional responsibility" courses. In fact, at my school there are two new "PR" courses, one in the ethics of tax practice and another in the ethics of business practice. Finally, I would suggest that Prof. Pearce simply look at this month's AALS PR Section Newsletter. Does it give any hint that PR is beginning to

wither in academia? On the contrary, it is clear that the subject is alive and well.

Actually, Prof. Pearce is unhappy with the direction that the academics in this field are headed; that they are not headed in the direction he would like them to go, to increase the emphasis of PR courses and scholarship on moral values instruction, or "virtue" ethics. But that is a different complaint than arguing that PR will never achieve the status of an "important" academic subject, unless Prof. Pearce is saying that legal ethics will never become an "important" subject UNLESS it changes direction and focuses on moral development and obligation. I fail to see any evidence of this.

Of course, as with most things, Pearce and Pera are both right, somewhat. Pearce is correct in that the PR courses are tending to veer in the direction of the "hard law of lawyering," that is, the law of agency, contracts and torts as applied to lawyers, with the ethics rules only "some evidence" of the lawyers' standard of conduct. This type of course tends to treat the rules of ethics as an afterthought and says nothing about professionalism or personal moral obligation. On the other hand, teaching professionalism and/or moral obligation/virtue ethics is a tricky business and, alone, fails to prepare our students to face the rules they must live by as lawyers and to alert them to the ethical pitfalls of practice. Not all of the ethical rules can be intuitively derived. As I tell my students, part of my job is to help them avoid inadvertently stepping in "ethical do-do." The answer must lie between.

Fred Moss
Dedman School of Law
Southern Methodist University
P.O. Box 750116
Dallas, Texas 75275-0116
214-768-2742
214-768-3142 (fax)
fmoss@mail.smu.edu

[This quote was at the bottom of Professor Moss's response, and it seemed to us not a bad way to close this discussion]

"It's like, at the end, there's this surprise quiz: Am I proud of me? I gave my life to become the person I am right now. Was it worth what I paid?" -Richard Bach, writer (1936-)

AALS PROFESSIONAL RESPONSIBILITY SECTION ANNOUNCEMENTS

ANNUAL MEETING PROGRAMS

We are hoping for another great turnout of Section members at this year's AALS Annual Meeting in New York January 2-6, 2008. This year our primary Section program is an extended program from 2-5:00 pm on Thursday, January 3, 2008, entitled *The Legacy of* Brown v. Board of Education *and the Future of Race and the American Legal Profession* (this program is [4240] when you fill out your registration). The Section's annual business meeting will follow at the conclusion of this program, and an exciting Section social event will follow on the heels of the business meeting (see *Dinner Bunch* below). The Section is also co-sponsoring, with the Section on ADR, *Troubling Ethics Issues in ADR: Time to Modify the Rules to Catch up with Reality?* [6560] on Saturday, January 5, from 3:30-5:15

GRACIOUS INVITATION TO THE SECTION FROM FORDHAM FOR THE SECTION DINNER AT THE ANNUAL MEETING

Reminder for those of you who will be in New York for the AALS Annual Meeting that Fordham is hosting a Professional Responsibility Scholarship Roundtable, light dinner and a reception on Thursday January 3, 2008. We will start with a reception at 5:00 p.m. and we have the room until 9:00 p.m. After everyone has eaten, we' ll open the floor for members of the Section on Professional Responsibility to present their research. This is an opportunity to discuss works in progress or an aspect of a research project, which is in a more final stage.

Speaking priority will be given to those scholars who advise us ahead of time that they have a particular idea to share. E-mail needhamc@slu.edu with PR Roundtable Speaking Slot in the subject line to indicate your interest in speaking. Presenters should plan to spend about five minutes explaining their idea and posing questions, followed by fifteen or twenty minutes of discussion and feedback. Those of you who have come to the Roundtables at the ABA Center for Professional Responsibility the past two years will recognize this as similar – but with the addition of food and a bit more time for each speaker.

This is also an opportunity for newer scholars to meet and discuss their ideas with more experienced scholars and to developing a mentoring relationship. More established scholars may have advice about placement and presentation of research as well as information about organizations active in professional responsibility issues. Experienced scholars may also receive a fresh perspective on their views.

All members of the Section on Professional Responsibility are welcome; but space is limited so let us know you are planning to attend. You do not have to be registered for the AALS meeting to take part in this event.

If you would like to participate but don' t want to make a presentation please send an e-mail to Carol Needham at needhamc@slu.edu with PR Attending Roundtable in the subject line. Contact us by Friday, December 14th. For more information, you can also contact Jessi Tamayo at Fordham Law School at (212) 636-6988.

WOULD YOU LIKE A MENTOR?

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

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

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

NEWSLETTER ANNOUNCEMENTS

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

It's not too early to send in announcements for next summer's professional and personal announcements issue, an issue constantly in production. Please send your announcements about personal events, professional activities and awards, or conferences and professional opportunities to Randy Lee at glee@widener.edu by August 16, 2008 (if not before!).

A colleague recently gave me a copy of an unpublished essay by **Monroe Freedman** entitled "On Teaching and Testing in Law School." While I found the whole essay uplifting and edifying, one idea in particular stood out for me. In the essay, Professor Freedman suggests having students grade four student exam answers after covering the relevant material in class. The answers represent two very good answers that take different approaches to the question, an average answer and a poor answer. After the students have come to their own conclusions about grading the answers, Professor Freedman discusses with the students the grades he actually gave and why.

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

PROFESSIONAL OPPORTUNITIES

FUNDING OPPORTUNITY FOR SCHOLARSHIP RELATING TO LITIGATION

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

While there is no deadline and awards will be made on a rolling basis, priority consideration for the initial awards will be given to submissions received by **January 1, 2008**. Applications should be submitted by email with the subject line "Litigation Research Fund" to Patsy Engelhard, Executive Director, ABA Section of Litigation, pengelhard@staff.abanet.org with a copy to Robert Nelson, Director, American Bar Foundation, rnelson@abfn.org.

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

ABA 2008 GAMBRELL PROFESSIONALISM AWARDS

The American Bar Association, through the Standing Committee on Professionalism and the Center for Professional Responsibility, is pleased to announce its 18th annual award competition for projects aimed at enhancing professionalism among lawyers.

Up to three awards, in the amount of $3500.00 each, will be presented. The funds for these awards are available through the E. Smythe Gambrell Fund for Professionalism. Law schools, state and local bar associations, law firms and not-for-profit law related organizations are eligible for the

awards. Programs submitted for consideration must be ongoing for at least one year prior to the entry deadline.

All award entries must be received on or before **March 31, 2008**. All entries should be addressed to:

E. Smythe Gambrell Professionalism Awards

American Bar Association

Center for Professional Responsibility

321 N. Clark Street

Chicago, Illinois 60610

or

Email: agarwin@staff.abanet.org

Questions regarding the awards should be directed to Kathleen Maher (312) 988-5307, e-mail: maherk@staff.abanet.org or Arthur Garwin (312) 988-5294, e-mail: agarwin@staff.abanet.org, or at the above address.

RELIGIOUS VALUES AND THE PRACTICE OF LAW

As part of its Catholic Lawyers Program, the Institute on Religion, Law & Lawyers Work at Fordham Law School is sponsoring a program Monday, February 11 from 6:00 till 7:45 pm on *Globalizing Justice Part II: Catholic Social Thought and the Multinational.* Gerald J. Russello, Fellow, Chesterton Institute at Seton Hall University will be speaking. The program is co-sponsored by the Feerick Center for Social Justice and Dispute Resolution and the Guild of Catholic Lawyers of the Archdiocese of New York

CITIZEN LAWYER

On February 8-9, 2008 William & Mary School of Law will host a conference critically examining the concept of the Citizen Lawyer and considering "what (if anything) legal education should do to form and generate citizen lawyers." Among an all-star list of speakers are Section members Paul Carrington, Laurence Friedman, Marc Galanter, Robert Gordon, David Luban, Sanford Levinson, James Moliterno, Taylor Reveley, and Deborah Rhode. Attendees must register, but registration is free. For further information, contact the Institute of Bill of Rights Law at ibrl@wm.edu or 757-221-3810.

IS THERE A HIGHER LAW CONFERENCE

The Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics at Pepperdine Law School will hold the conference *Is There a Higher Law? Does It Matter?* On February 21-22, 2008 on the Pepperdine campus in Malibu California. The conference promises to bring together law professors, judges, theologians, economists, historians, and philosophers, some of whom have argued for and some against the notion that there is a higher law. The conference is offering six MCLE credits. For a detailed conference schedule, visit: http://law.pepperdine.edu/ilre/conferences.html. You may register at http://law.pepperdine.edu/ilre

CONFERENCE ON THE CARNEGIE REPORT AND THE FUTURE OF LEGAL EDUCATION

From February 20-24, 2008 the Georgia State University College of Law will be hosting an international conference on the Future of Legal Education, which is expected to be the first major academic conference to address the widely-discussed report, *Educating Lawyers*, issued earlier this year by the Carnegie Foundation for the

Advancement of Teaching. The Carnegie Report criticizes legal education which produces only "smart problem solvers" when the need is for responsible professionals who have learned through realistic and real-life experience what it means to be committed to the needs of both clients and the larger society. Speakers already scheduled include the lead author of the Carnegie Report, Dr. William Sullivan, and a very distinguished group of innovative legal educators from other countries, including **Dean Martin Bohmer** (Argentina), **Dean Gary Davis** (Australia), **Dean Jeff Giddings** (Australia), **Dr. N.R. Madhava Menon** (founding dean of the National Law School of India), **Professor Paul Maharg** (Scotland), **Professor David McQuoid-Mason** (South Africa), **Professor Mariela Puga** (Argentina) and **David Weisbrot**, President of the Australian Law Reform Commission (and former Dean, University of Sydney Law School). The conference is sponsored by the Global Alliance for Justice Education, the Council of Australian Law Deans, the National Institute for Teaching Ethics and Professionalism (USA), the Consortium of Professionalism Initiatives, and the W. Lee Burge Endowment for Law & Ethics at Georgia State University. The winners of the 4th Annual Award for Innovation and Excellence in Teaching Professionalism, conferred by the ABA Standing Commission on Professionalism and the Conference of Chief Justices, will also present their professionalism programs during the conference. A call for papers and registration information will be available later this year; the conference web site contains instructions to get on a mailing list to receive this information.
Further information: Visit http://law.gsu.edu/FutureOfLegalEducationConference/

CANONS ANNIVERSARY CONFERENCE

On March 21, 2008, *The Charlotte Law Review* will host a symposium to celebrate the Centennial Anniversary of the American Bar Association's adoption of the Canons of Professional Ethics. Confirmed speakers include the Honorable Dennis Archer, former ABA President, and Justice John Tyson of the North Carolina Court of Appeals.

MENTORING CONFERENCE

The Nelson Mullins Riley & Scarborough Center on Professionalism at the **University of South Carolina School of Law** will host a conference entitled "Mentoring -- the Future of the Legal Profession" in Columbia, SC on March 27-29, 2008. Watch future newsletters for details.

NATIONAL AWARD FOR INNOVATION AND EXCELLENCE IN TEACHING PROFESSIONALISM

The National Awards for Innovation and Excellence in Teaching Professionalism have been given to full-time law teachers by the ABA Standing Committee on Professionalism and the Conference of Chief Justices since 2004. The first place winner receives $2000 and honorable mention winners receive $500. The presentations by the three finalists and the selection of the first place winner of the 2008 Award for Innovation and Excellence in Teaching Professionalism will take place Thursday, February 21 and Friday, February 22 at Georgia State University in Atlanta in conjunction with an international Conference on the Future of Legal

Education. Applications are submitted on-line through the Award web site; the application period for the 2008 awards has not yet opened. More information, including all the past applications for the award, and instructions for getting on an email mailing list to be notified when the application period opens, is available on the Award web site: http://law.gsu.edu/ccunningham/Professionalism/Award-Home.htm

THIRD INTERNATIONAL LEGAL ETHICS CONFERENCE CALL FOR PAPERS

The Third International Legal Ethics Conference will be held on Australia's Gold Coast on July 13-16, 2008 and hosted by Griffith University and the University of Queensland. The theme of the conference is *Integrity in Legal Practice.* A call for papers has been issued, and proposals are due by February 29, 2008. It is recommended that proposals fit within one of several streams for the conference and involve an abstract of no more than 300 words. For more information, visit http://www.griffith.edu.au/conference/legal-ethics-2008 or email legalethics@griffith.edu.au

2008 ABA CoLAP CONFERENCE

The ABA Commission on Lawyers Assistance Programs has set their 2008 Conference for Tuesday, October 21 through Friday, October 24 in Little Rock, Arkansas.

MEMBER NEWS

(Normally we run Member News only in the summer, but we had a flurry of member activities this fall so we thought we would acknowledge some highlights now.)

Pepperdine Law School's Institute on Law, Religion, and Ethics was recently dedicated the Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics. The dedication is in recognition of the wonderful friendship and generous support the Nootbars have provided both to Pepperdine and the Institute. The Institute celebrated this dedication with a lecture this fall by renowned author and speaker Dr. Os Guinness.

Zachary Calo has joined the faculty of the Valparaiso University School of Law as an assistant professor. Professor Calo has particular interests in Business Ethics and Law & Theology.

New York University Press just released *Faith and Law: How Religious Traditions from Calvinism to Islam View American Law*, edited by former AALS Professional Responsibility Section Chair **Robert Cochran** of Pepperdine. In this book authors from sixteen religious traditions discuss how their religious traditions view law and address one or more current legal issues from that perspective.

C. Ronald Ellington, the A. Gus Cleveland Distinguished Chair of Legal Ethics and Professionalism at the University of Georgia School of Law, has been named a Josiah Meigs Distinguished Teaching Professor, the University of Georgia's highest honor for teaching excellence.

Margareth Etienne, Professor of Law at the University of Illinois, will be speaking on March 5th as part of the Chicago-Kent Faculty Workshop Series.

David Hall, professor at Northeastern University School of Law, delivered *Troubled Waters: The Spiritual*

Revitalization of the Legal Profession at the 2007 ABA Commission on Lawyer Assistance Programs Conference.

Michael J. Kelly, former dean of the University of Maryland School of Law and curently Executive Director of the National Senior Citizens Law Center [NSCLC], a non-profit organization committed to advocacy on behalf of low income older Americans, just published *LIVES OF LAWYERS REVISITED: Transformation and Resilience in the Organizations of Practice* (University of Michigan Press). The book presents a sustained argument that the boundaries of legal ethics or professional responsibility need to be expanded to include analysis of the work lives of lawyers. *Lives of Lawyers Revisited* extends Michael Kelly's work in the original *Lives of Lawyers* (1994), offering unique insights into the nature of the legal profession, examined through stories of the same extraordinarily varied law practices. By placing the spotlight on organizations as phenomena that generate their own logic and tensions, *Lives of Lawyers Revisited* speaks to the experience of most lawyers and anticipates important issues relating to the meaning of "professionalism."

Marc Galanter, University of Wisconsin, called it "the best single book about the American realities and possibilities of the American legal profession," **Robert W. Gordon**, Yale Law School, called it “one of the most interesting and original books on professions and professionalism to appear in years," and **David Luban**, Georgetown University, said that Michael Kelly “writes with intelligence, great insight, and above all with heart. This is a superb book."

For an examination copy of Lives of Lawyers Revisited (in paperback) for possible classroom use, contact the author at mjk.balt@gmail.com.

On November 7, Carol M. Langford delivered Hofstra University School of Law’s Howard Lichtenstein Distinguished Professorship of Legal Ethics Lecture on *Regulation of the Profession Through the Admissions Process and the Role of Law Schools in Defining Moral Character.*

Andrew Perlman, professor at Suffolk Law School, spoke in September at Cumberland School of Law as part of their Works-in-Progress Lunch Series.

Washington University School of Law in Saint Louis has dedicated this year’s Public Interest Law and Policy Speakers Series to *Access to Justice.* Upcoming speakers include Section member **Abbe Smith**, professor at the Georgetown Law Center, who will speak on February 21st on *Representing the Wrongly Accused: the High Horse of Innocence*.

Marc I. Steinberg, Radford Professor of Law at Southern Methodist University, recently published the treatise *Attorney Liability After Sarbanes-Oxley* (Law Journal Press 2006) and a law student text entitled *Lawyering and Ethics for the Business Attorney* (Thomson/West 2d edition 2007).

Aspen Publishers just published the second edition of *PROFESSIONAL RESPONSIBILITY: Examples and Explanations* by **W. Bradley Wendel**, Professor of Law at the Cornell University Law School.

DEVELOPMENTS IN THE REGULATION OF LAWYERS

By Roy Simon (Hofstra)

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

NATIONAL DEVELOPMENTS

American Bar Association Developments

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

ABA Model Rules of Professional Conduct: The ABA Model Rules of Professional Conduct have not been amended since the Spring Newsletter. However, proposed amendments to Rule 3.8 have been circulating among various ABA committees and stand a good chance of adoption in 2008. The proposed amendments would impose certain post-conviction responsibilities on prosecutors. The amendments were originally proposed in 2006 in a report by the New York City Bar's Committee on Professional Responsibility, spearheaded by Fordham's Bruce Green and Cardozo's Ellen Yaroshefsky. The City Bar proposals were adopted, with some modifications, by the New York State Bar Association House of Delegates on November 3, 2007, and have been refined by the ABA Criminal Justice Section, whose Chair is Stephen Saltzburg of George Washington, in consultation with the ABA Standing Committee on Ethics and Professional Responsibility. The proposal on the table as of late November 2007 would add the following new paragraphs to Rule 3.8:

> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court or authority, and
>
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (A) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>
> (B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
>
> (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not

commit, the prosecutor shall seek to remedy the conviction.

The proposed amendments are accompanied by proposals for small but significant additions to Comment 1 to Rule 3.8, and for these completely new Comment paragraphs:

> [7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.
>
> [8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.
>
> [9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

The proposed amendments are scheduled to come before the ABA House of Delegates at its February 2008 Mid-Year Meeting. Because the Criminal Justice Section has carefully and thoughtfully solicited comments and built consensus among prosecutors, defense lawyers, scholars, and others in the criminal justice world, I anticipate that the ABA will adopt these important amendments as proposed. The Criminal Justice Section's Report and Recommendation is available online at *www.abanet.org/crimjust/policy/rule3-8amend.pdf*.

ABA Model Rule on Conditional Admission to Practice Law (proposed): The ABA Commission on Lawyer Assistance Programs (CoLAP) is the primary sponsor of a proposed Model Rule on Conditional Admission to Practice Law. The rule is designed to free bar admission

authorities from the stark binary choice between admission or denial of admission when an applicant has a history of problems with mental illness or substance abuse but also shows signs of recent rehabilitation. The proposed Model Rule creates a third option: conditional admission to an applicant who agrees to get mental health care or undergo monitoring for up to two years after admission.

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

Federal Statutes, Rules, and Regulations

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

Federal Rules of Evidence: In June 2007, the Standing Committee on Rules of Practice and Procedure voted to circulate for public comment a proposed new Rule 502 of the Federal Rules of Evidence, to be entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver." The June version included a paragraph to govern "selective waiver," but it was bracketed to indicate that the Standing Committee was not taking a position on the selective waiver language. In September 2007, after deleting the selective waiver provision (which was generating a lot of controversy), the Judicial Conference voted to send proposed Rule 502 directly to Congress, bypassing the usual stop at the Supreme Court. Proposed Rule 502 provides as follows:

> *Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver*
>
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> (a) *Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver.* — When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.
>
> (b) *Inadvertent disclosure.* — When made in a federal

proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

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

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

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

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

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

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

(e) *Controlling effect of a party agreement.* — An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

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

(g) *Definitions*. — In this rule:

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

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

The direct transmission of Rule 502 to Congress is a first. Under 28 U.S.C. 2074(b), which was enacted in 1988, any "rule creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." This is the first time that 2074(b) has ever been invoked, because the Judicial Conference has not sent a proposed privilege rule to Congress since §2074(b) was enacted. Unlike other proposed rules of evidence, therefore, inaction by Congress will not result in automatic adoption of the rule. Rather, Rule 502 will not become law unless and until Congress affirmatively approves it, on its own schedule. Congress is now on its own schedule. It could enact Rule 502 next week, next month, next year – or never.

For official updates, new proposals, and background information regarding the Federal Rules of Evidence and other federal rules, visit the official web site of the U.S. Courts at *www.uscourts.gov* (click on

"Federal Rulemaking") or contact John Rabiej, Chief of the Rules Committee Support Office, at (202) 502-2600.

DEVELOPMENTS IN THE STATES

Broad Trends

"Ethics 2000" reviews. Over the past five 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 Spring 2007 PR Newsletter was published in April, amended ethics rules have taken effect in at least five separate jurisdictions – Rhode Island (effective April 15, 2007), Kansas, Missouri, Wisconsin (all effective July 1, 2007), and Nevada (effective September 1, 2007). Four other states – Colorado, Connecticut, New Hampshire, and Oklahoma – will roll out significantly modified Rules of Professional Conduct effective when the ball drops at Times Square on January 1, 2008.

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

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

Alabama (www.alabar.org): In July 2007, the Trustees of the Alabama Law Foundation, the Access to Justice Commission, and the Alabama State Bar Board of Bar Commissioners all unanimously approved a proposed amendment to Alabama's Rule 1.15 that would make Alabama's IOLTA program mandatory. Alabama is currently one of only 16 states whose IOLTA program is not mandatory, and (according to an article in the Alabama State Bar's newsletter) "Alabama currently ranks behind all 50 states, the District of Columbia and Puerto Rico in funding for access for justice for the poor in civil matters." The Alabama Supreme Court is still considering the proposal.

California (www.calbar.ca.gov, www.courtinfo.ca.gov, and www.leginfo.ca.gov): In June 2006, the California State Bar's Board Committee on Regulation, Admissions and Discipline Oversight circulated for public comment a proposed new Rule 3-410, entitled

"Insurance Disclosure," that would require lawyers who are not covered by professional liability insurance to inform clients in writing of their lack of coverage. The Committee simultaneously circulated a proposed new court rule, Rule 950.6, which would require all lawyers to certify to the State Bar whether they are covered by professional liability insurance and whether they represent clients – and would require the information to be posted online. If both proposals are adopted, California would become the first state to require dual disclosure —both to clients and to the State Bar.

This past summer the Board of Governors voted by a single vote to oppose the disclosure proposals, but the issue came before the Board on November 9, 2007. The Board referred the issue to a special committee that will review the proposals and report to the Board at its December 13, 2007 meeting. Some revisions to the existing proposed Rule 3-410 are likely, probably limiting the disclosure obligation to situations in which California law already requires a written retainer agreement (basically all contingent fee cases, and most matters where fees are expected to exceed $1,000). The proposed court rule on insurance disclosure is likely to be taken up separately.

The State Bar of California's Commission for the Revision of the Rules of Professional Conduct, which has been comprehensively reviewing California's unique rules since 2001 to make them more like the ABA Model Rules, issued five new draft rules in July (making a total of 32 draft rules so far). The Commission expects to release additional proposed rules for public comment periodically through 2008. The proposals use the numbering, the format, and much of the language of the ABA Model Rules of Professional Conduct.

On the statutory front, in October 2007 Governor Schwarzenegger signed the following bill (AB 403) that may have future implications for California probate law and for California's evidence rules governing the attorney-client privilege after the privilege holder has died:

Under existing law, a client of a lawyer has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and lawyer if the privilege is claimed by the holder of the privilege, a person who is authorized to claim the privilege by the holder, or the person who was the lawyer at the time of the confidential communication. However, the lawyer may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

This bill would require the California Law Revision Commission to study whether and, if so, under what circumstances, the attorney-client privilege should survive the death of the client, and to report all of its findings to the Legislature on or before July 1, 2009. [Emphasis added.]

The Governor also signed the following bill (SB 686) that adds a new Article 4.8 (Pro Bono Services) and a new §6073 to California's Business and Professions Code. The new § 6073 provides as follows:

> It has been the tradition of those learned in the law and licensed to practice law in

> this state to provide voluntary pro bono legal services to those who cannot afford the help of a lawyer. Every lawyer authorized and privileged to practice law in California is expected to make a contribution. In some circumstances, it may not be feasible for a lawyer to directly provide pro bono services. In those circumstances, a lawyer may instead fulfill his or her individual pro bono ethical commitment, in part, by providing financial support to organizations providing free legal services to persons of limited means. In deciding to provide that financial support, the lawyer should, at minimum, approximate the value of the hours of pro bono legal service that he or she would otherwise have provided. In some circumstances, pro bono contributions may be measured collectively, as by a firm's aggregate pro bono activities or financial contributions. Lawyers also make invaluable contributions through their other voluntary public service activities that increase access to justice or improve the law and the legal system. In view of their expertise in areas that critically affect the lives and well-being of members of the public, lawyers are uniquely situated to provide invaluable assistance to benefit those who might otherwise be unable to assert or protect their interests and to support those legal organizations that advance these goals.

The statute (like ABA Model Rule 6.1) does not seem enforceable, but satisfies those who wanted the Legislature to make a stronger statement about the importance of pro bono work.

Colorado (www.cobar.org): Comprehensively amended Rules of Professional Conduct will take effect in Colorado on January 1, 2008. The online version is not redlined, so you're on your own to figure out what has changed, and why, and how it compares to the ABA Model Rules.

Connecticut (http://www.jud.ct.gov/PB.htm): Connecticut amended a number of rules effective January 1, 2008. In addition, Connecticut amended Rule 1.15 In the rules effective September 1, 2007. The amended rules are available in the official 2007 Connecticut Practice Book at the website of the Connecticut courts. Among the more interesting new provisions is the following addition to Rule 1.2(a), which gives insurance carriers much greater leeway to settle lawsuits:

> Subject to revocation by the client and to the terms of the contract, a client's decision to settle a matter shall be implied where the lawyer is retained to represent the client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss, and the third party elects to settle a matter without contribution by the client.

Related changes were made in Rule 1.8. Connecticut also adopted a variation on ABA Model Rule 5.5, which is significant because the Connecticut Bar Association had opposed ABA Model Rule 5.5 a few years ago. (Connecticut had already adopted ABA Model Rule 8.5 verbatim In the rules effective January 1, 2007.)

Florida (www.flabar.org): The Disciplinary Procedure Committee is addressing the criminal defendant perjury issue with a proposed change to the Comment to Rule 4-3.3. The proposed change would clarify that there is no difference between an attorney's duty in a civil or criminal case when a client commits perjury, and that a lawyer's mere withdrawal

from the case is unlikely to adequately correct the misrepresentation to the court.

Regarding advertising, the Board Review Committee on Professional Ethics is expected to bring the attorney-to-attorney advertising issue back to the board and may survey Florida Bar members on the issue. Currently, lawyer-to-lawyer advertising is subject to Florida's advertising rules, including the rule requiring lawyers to submit an advertisement to the Bar for review if it contains more than basic information. But the Board voted to have a moratorium on enforcing that rule while it studies the matter and considers recommending an amendment.

On June 1, 2007, the Florida Bar filed a report with the Florida Supreme Court recommending relatively minor amendments to Rule 5.5. (In 2005, when the Supreme Court of Florida adopted rules similar to ABA Model Rules 5.5 and 8.5, the court directed The Florida Bar "to monitor the implementation of these amendments and any challenges that arise and report back to the Court within two years from the effective date of these amendments with recommendations for improvements or changes, if any." The June 1st report complies with that directive.) Among other things, the proposed amendments make clear that Rule 5.5 by itself does not authorize an out-of-state lawyer to appear before a tribunal in Florida – the lawyer must also obtain permission of the Florida tribunal in accordance with existing *pro hac vice* rules. The court published the proposed amendments to Rule 5.5 for public comment. Comments are due December 17, 2007.

On November 15, 2007, the Florida Supreme Court approved a new program that will allow paralegals to use the designation "Florida Registered Paralegal" if they meet minimum educational, certification, or work experience criteria, and agree to abide by an established code of ethics. The program will take effect March 1, 2008. The program closely follows a proposal by Florida Bar's Special Committee to Study Paralegal Regulation.

Illinois (www.isba.org): Effective June 1, 2007, the Illinois Supreme Court has amended Rule 1.15 to require lawyers and law firms to deposit nominal or short-term funds of clients or third parties in accounts at "eligible financial institutions." Eligible institutions "shall maintain IOLTA accounts that pay the highest interest rate or dividend available … to its non-IOLTA account customers when (they) meet or exceed the same minimum balance or other account eligibility guidelines." Illinois thus becomes the eleventh state to adopt a "comparability rule." Meanwhile, 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.

Kansas (www.kscourts.org): Kansas comprehensively amended its Rules of Professional Conduct effective July 1, 2007. The amended rules are available in legislative style (showing changes from the former Kansas rules) at www.kscourts.org/rules-procedures-forms/attorney-discipline/KRPCnew.pdf.

Maine (www.mebaroverseers.org/ethicsweb/ethicsmain.html): On November 6, 2006, Maine's Task Force on Ethics 2000 (whose Reporter is Professor Lois Lupica of the University of Maine School of Law) issued a complete draft of comprehensive amendments to Maine's current ethics rules. The proposed

rules conform to the structure of the ABA Model Rules, and conform to the language of the ABA Model Rules except where established Maine law and practice warrant divergence or variation. The Task Force is studying public comments (which were due by January 15, 2007) and anticipates submitting final recommendations to the Maine Supreme Judicial Court soon. In the meantime, Maine remains one of only three states (along with California and New York) that have not yet adopted the format and numbering system of the ABA Model Rules.

Michigan (www.michbar.org): The Michigan Supreme Court is still considering comprehensive amendments to the Michigan Rules of Professional Conduct that were circulated by the court for public comment in July 2004. (The comment deadline expired more than two 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").

Missouri (www.mobar.org): ***C***omprehensive amendments to the Missouri Rules of Professional Conduct took effect on July 1, 2007. The rules generally bring the Missouri rules into line with the ABA Model Rules, except that Missouri did not adopt the 2003 versions of Rule 1.6 or Rule 1.13.

Nevada (www.nvbar.org): Effective September 1, 2007, Nevada adopted some of the most demanding advertising and communication provisions in the country. For example, a new Rule 1.4(c), headed "Lawyer's Biographical Data Form," provides that each lawyer or law firm "shall have available in written form to be provided upon request of the State Bar or a client or prospective client a factual statement detailing the background, training and experience of each lawyer or law firm." That form requires only routine information. But Rule 1.4(c) goes on to say that, upon request, each lawyer or law firm shall provide "additional information," including such things as a "good faith estimate" of "the number of jury trials tried to a verdict by the lawyer to the present date" and "the number of court (bench) trials tried to a judgment by the lawyer to the present date," in both instances identifying the courts. Nevada Rule 1.18 contains this new provision lifted almost verbatim from Comment [5] to the ABA Model Rule:

> (f) A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Nevada also has also adopted a 45-day blackout period on all written communication "directed to a specific prospective client who may need legal services due to a particular transaction or occurrence" of any kind, not just accidents and disasters – see Rule 7.3(d). The new rules, including a "Model Rule Comparison" and guidance about filling out the Lawyer's Biographical Data Form and complying with other provisions, are available online at *www.nvbar.org/SCLA/scla.htm*.

New Hampshire (www.nhba.org): Comprehensively amended New Hampshire Rules of Professional Conduct will take effect on January 1, 2008. The new rules are available online at *www.nhbar.org/publications/ethics/default.asp*. I also strongly recommend looking at the New Hampshire Supreme Court's 162-

page July 25, 2007 Order, announcing the new rules, which is found at *www.courts.state.nh.us/supreme/orders/20072507.pdf*. Each rule that differs from the corresponding ABA Model Rule of Professional Conduct is followed by a "New Hampshire Comment" that clearly and concisely explains how and why New Hampshire departed from the ABA Model Rule. These comments are among the most thoughtful I have seen from any state.

New Jersey (www.judiciary.state.nj.us/rules/apprpc.htm): When Rule 5.5 was adopted in 2004, the New Jersey Supreme Court said that three years later the Supreme Court would have its Professional Responsibility Rules Committee (PRRC) "undertake a comprehensive evaluation of the experience gained in multijurisdictional practice to determine whether any modifications to the RPC 5.5 amendments as adopted are necessary or desirable." In February 2007, the PRRC issued a report recommending certain technical amendments and clarifications to Rules 5.5. The New Jersey courts declined to adopt those proposed clarifications "at this juncture," but the Supreme Court asked the PRRC "for an overall review and evaluation of the provisions of current RPC 5.5." When we went to press in September 2007, that review and evaluation" was still in progress.

New York (www.nysba.org and www.courts.state.ny.us): As noted last time, the New York Appellate Division adopted wholesale amendments to the New York Disciplinary Rules governing lawyer advertising effective February 1, 2007. Some of these rules have already been struck down as unconstitutional – see *Alexander v. Cahill*, 2007 WL 2120024 (N.D.N.Y., July 23, 2007) (Scullin, J.). The provisions that Judge Scullin held to be unconstitutional were DR 2-101(C)(1), (3), (5), and (7), and DR 2-101(G)(1). An appeal to the Second Circuit is pending and will be argued in March 2008.

The courts wrote the rules in secret, so legislative history is sparse. Moreover, the courts did not release "public" comments submitted by the bar or write any explanatory Ethical Considerations. (ECs are adopted only by the voluntary New York State Bar Association, not by the courts). However, on November 3, 2007, effective immediately, the State Bar's House of Delegates approved more than 20 new ECs drafted by the Committee on Standards of Attorney Conduct (COSAC) to provide guidance on interpreting the new rules. (The new ECs do not address the provisions of DR 2-101 that have been held unconstitutional.)

Meanwhile, proposals for comprehensive amendments to the New York Code of Professional Responsibility are moving ahead on schedule. The State Bar House of Delegates approved the entire package of rules proposed to COSAC on November 3, 2007 and expects to forward the complete set of proposals to the Appellate Divisions early in 2008. The proposals follow the format, numbering system, and much of the language of the ABA Model Rules of Professional Conduct. It is not possible to estimate when the courts will act on the proposals.

Ohio (www.sconet.state.oh.us): On December 10, 2007, the Supreme Court of Ohio issued a new publication for lawyers and judges called "The Supreme Court of Ohio Professional Ideals for Ohio Lawyers and Judges." It includes creeds and ideals adopted by the Court from recommendations from the Commission on Professionalism.

Oklahoma (www.okbar.org): Oklahoma will adopt comprehensively

revised Rules of Professional Conduct effective January 1, 2008. The new rules are available online at www.okbar.org/ethics/ORPC07.pdf.

Vermont (www.vtbar.org): On December 28, 2006 the Vermont Bar's Civil Rules Committee proposed that the Vermont Supreme Court, as part of the Rules for Licensing of Attorneys, adopt a rule requiring insurance disclosure. The Committee asked the court to consider requiring disclosure of both liability limits and deductibles. The proposal is still pending.

Virginia (www.vsb.org): When it meets on March 1, 2008, the Virginia State Bar Council is expected to consider proposed amendments to Rules 1.9 and 1.11 of the Rules of Professional Conduct. The Standing Committee on Legal Ethics proposes amending Rule 1.11 by moving part of Virginia's Comment [10] into the body of the rule because the Comment addresses a substantive issue. (Comment [10] deals with the disqualification of other lawyers at a government agency when one of the lawyers is disqualified from a matter based on work in private practice.) The Committee does not propose modifying Rule 1.11 in any other way. The Standing Committee also proposes expanding Comment [5] to Rule 1.9 to provide reciprocal guidance regarding lawyers who move from private to public employment.

Virginia's new *pro hac vice* rule took effect on July 1, 2007. The Virginia Supreme Court is still considering proposed amendments to Rule 4.2 and the Comment to Rule 8.4 of the Virginia Rules of Professional Conduct. The proposed amendments have been pending before the court since October 2006.

Washington State (www.wsba.org): Effective April 24, 2007, Washington amended Rule 1.8 ("Conflict Of Interest: Current Clients: Specific Rules"). Unfortunately, the web site does not indicate how the rule was amended. Also, effective July 1, 2007, the Washington Supreme Court adopted a mandatory new insurance disclosure rule. For both rules, see www.courts.wa.gov/court_rules/?fa=court_rules.adopted. (The Washington courts deserve high praise for organizing the rules page in a logical and helpful fashion.)

Wisconsin (www.wisbar.org): Comprehensively revised Rules of Professional Conduct for Attorneys took effect on July 1, 2007. The amended rules do not adopt ABA Model Rule 5.5 regarding multijurisdictional practice, but on April 12, 2007 the Wisconsin Supreme Court held a public hearing on the issue. The hearing focused on whether Wisconsin should adopt the Bar's proposal, which generally tracks ABA Model Rule 5.5 but does not recommend that the Supreme Court adopt ABA Model Rule 5.5(d)(1) regarding in-house counsel. A link to the proposal is available at www.wicourts.gov/news/archives/2007/scrule032707.htm. The proposal remains pending before the Supreme Court.

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Baxter, *2006 Changes to the Florida Rules of Professional Conduct*, 31 NOVA L. REV. 1 (2006).

Buhai, *Act Like a Lawyer, be Judged Like a Lawyer: the Standard of Care for the Unlicensed Practice of Law*, UTAH L. REV. 87 (2007).

Cardozo, *The Use of ADR Involving Local Governments: the Perspective of the New York City Corporation Counsel*, 34 FORDHAM URB. L.J. 797 (2007).

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David, *et al.*, *Recent Developments Affecting the Liability of Professionals, Officers, and Directors*, 42 TORT TRIAL & INS. PRAC. L. J. 643 (2007).

Denbeaux and Boyd-Nafstad, *The Attorney-Client Relationship in Guantanamo Bay*, 30 FORDHAM INT'L L.J. 491 (2007).

D'Hue, *Disclosing the Improper Verb Tense: Are Scientists Knaves and Patent Attorneys Jackals Regarding the Effects of Inequitable Conduct?*, 14 U. BALT. INTELL. PROP. L.J. 121 (2006).

Etherington and Lee, *Ethical Codes and Cultural Context: Ensuring Legal Ethics in the Global Law Firm*, 14 IND. J. GLOBAL LEGAL STUD. 95 (2007).

Ford, *Fear of a Blackened Planet: Pressured by the War on Terror, Courts Ignore the Erosion of the Attorney-Client Privilege and Effective Assistance of Counsel in 28 C.F.R. § 501.3(d) Cases*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 51 (2006).

Hauser, Langa and Maurice, *International Private Client*, 41 INT'L LAW. 569 (2007).

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McKoy, *et al., Is Ethics for Sale? Juggling Law and Ethics in Managed Care*, 8 DEPAUL J. HEALTH CARE L. 559 (2005).

McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007).

Merling, *Advocacy at its Best: the Views of Appellate Staff Attorneys*, 8 J. APP. PRAC. & PROCESS 301 (2006).

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Miller, *Meta-Ethical Competence as a Lawyer Skill: Variant Ethics Affecting Lawyer and Client Decision-Making*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 91 (2007).

Moyer and Anway, *Biotechnology and the Bar: a Response to the Growing Divide Between Science and the Legal Environment*, 22 BERKELEY TECH. L.J. 671 (2007).

N.Y.C. Bar Assoc. Task Force, *Report on the Lawyer's Role in Corporate Governance*, 62 BUS. LAW. 427 (2007).

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Reyes, *Protecting the "Freedom of Transit of Petroleum": Transitional Lawyers Making (Up) International Law in the Caspian*, 24 BERKELEY J. INT'L L. 842 (2006).

Rovner, *the Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113 (2007).

Rutledge and Lu, *No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization About to be Governed by a New Law*, 45 BRANDEIS L.J. 755 (2007).

Sachdeva, *Measuring Quality of Legal Services–Implementing Outcomes Research in Law*, 11 J. MED. & L. 1 (2007).

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Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J. L. BUS. & FIN. 486 (2007).

Selvin and Lowenthal, *Liability Insurance Coverage for Copyright Infringement: a Copyright Practitioner's Guide*, 54 J. COPYRIGHT SOC'Y U.S.A. 861 (2007).

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Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569 (2007).

Wasby, *"Why Clerk? What Did I Get Out of It?"*, 56 J. LEGAL EDUC. 411 (2006).

Waters, *Market Control and Lawyers in the Former Soviet Union*, 8 J. L. SOC'Y 1 (2007).

Winick, *A Legal Autopsy of the Lawyering in Schiavo: a Therapeutic Jurisprudence/Preventive Law Rewind Exercise*, 61 U MIAMI. L. REV. 595 (2007).

Yu, *Enhancing Legal Aid Access Through an Open Source Commons Model*, 20 HARV. J. L. & TECH. 373 (2007).

Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73 (2007).

Zucker, *A Triumph for Gideon: the Evolution of the Right to Counsel for California Parolees in Parole Revocation Proceedings*, 33 W. ST. U. L. REV. 1 (2006).

Comment, *Surfing the Next Wave of Outsourcing: the Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, BYU L. REV. 483 (2007).

Comment, *"I'm Calling My Lawyer ... in India!": Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99 (2006).

Comment, *The Latest Call for Diversity in Law Firms: Is it Legal?*, 75 UMKC L. REV. 847 (2007).

Comment, *When Can a Law Firm Discriminate Among its Own Employees to Meet a Client's Request? Reflections on the ACC's Call to Action*, 9 U. PA. J. LAB. & EMP. L. 657 (2007).

Comment, *Safekeeping Client Property: Why the ABA is Hands-off and the States are Hand-holding*, 38 U. TOL. L. REV. 1279 (2007).

Note, *Protecting California's Coastal Communities: Four Models of Public Interest Lawyering*, 30 ENVIRONS 199 (2007).

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Inclusion into the Immediately Appealable Club, 34 N. KY. L. REV. 151 (2007).

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Note, *Non-equity Partnership: a Flawed Solution to the Disproportionate Advancement of Women in Private Law Firms*, 28 WOMEN'S RTS. L. REP. 93 (2007).

Symposium, *Lawyers in the Crosshairs: the New Legal and Ethical Duties of Corporate Attorneys*, 57 CASE W. RES. L. REV. 337.

Symposium, *Globalization of the Legal Profession*, 14 IND. J. GLOBAL LEGAL STUD. 1 (2007).

Symposium, *For All the Saints: How the Lives of Extraordinary Catholics Can Shed Light on the Ordinary Practice of Law*, 46 J. CATH. LEGAL STUD. 1 (2007).

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Symposium, *Two Issues Confronting the Legal Profession*, 41 LAW & SOC'Y REV. 1 (2007).

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Symposium, *Legal Malpractice and Professional Responsibility*, 38 ST. MARY'S L.J. 849 (2007).

Symposium, *Practitioners' Perspective & Ethics*, 58 S. C. L. REV. 855 (2007).

Symposium, *Professional Responsibility: ABA Accreditation Standards for Law Schools*, 11 TEX. REV. L. & POL. 377 (2007).

Symposium, *Strategies to End Poverty and Inequality*, 10 UDC/DCSL L. REV. 35 (2007).

Symposium, *Ethics of Family Representation*, 75 UMKC L. REV. 957 (2007).

Symposium, *Law Stories: Tales from Legal Practice, Experience, and Education*, 75 UMKC L. REV. 1127 (2007).