

# UPDATES ON ETHICS FOR THE PUBLIC LAWYER

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July 11, 2012

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## Statutory Conflict of Interest Provisions

### 5 §18. DISQUALIFICATION OF EXECUTIVE EMPLOYEES FROM PARTICIPATION IN CERTAIN MATTERS

1. **Definitions.** As used in this section, unless the context indicates otherwise, the following terms have the following meanings.

A. "Constitutional officers" means the Attorney General, Secretary of State and Treasurer of State.

B. "Executive employee" means the constitutional officers, the State Auditor, members of the state boards and commissions as defined in chapter 379 and compensated members of the classified or unclassified service employed by the Executive Branch, but it shall not include:

(1) The Governor;

(2) Employees of and members serving with the National Guard;

(3) Employees of the University of Maine System, the Maine Maritime Academy and state community colleges;

(4) Employees who are employees solely by their appointment to an advisory body;

(5) Members of boards listed in chapter 379, who are required by law to represent a specific interest, except as otherwise provided by law; and

(6) Members of advisory boards as listed in chapter 379.

C. "Participate in his official capacity" means to take part in reaching a decision or recommendation in a proceeding that is within the authority of the position he holds.

D. "Proceeding" means a proceeding, application, request, ruling, determination, award, contract, claim, controversy, charge, accusation, arrest or other matter relating to governmental action or inaction.

E. "Participates in the legislative process" means to provide any information concerning pending legislation to a legislative committee, subcommittee or study or working group, whether orally or in writing.

2. **Executive employee.** An executive employee commits a civil violation if he personally and substantially participates in his official capacity in any proceeding in which, to his knowledge, any of the following have a direct and substantial financial interest:

A. Himself, his spouse or his dependent children;

B. His partners;

C. A person or organization with whom he is negotiating or has agreed to an arrangement concerning prospective employment;

D. An organization in which he has a direct and substantial financial interest; or

E. Any person with whom the executive employee has been associated as a partner or a fellow shareholder in a professional service corporation pursuant to Title 13, chapter 22-A, during the preceding year.

2-A. **Participation in legislative process.** An executive employee commits a civil violation if the employee participates in the legislative process in the employee's official capacity concerning any legislation in which any person described in subsection 2, paragraphs A to E has any direct and substantial financial interest unless the employee discloses that interest at the time of the employee's participation.

3. **Former executive employee.** Former executive employees shall be subject to the provisions in this subsection with respect to proceedings in which the State is a party or has a direct and substantial interest.

A. No former executive employee may knowingly act as an agent or attorney for, or appear personally before, a state or quasi-state agency for anyone other than the State for a one-year period following termination of the employee's employment with the agency or quasi-state agency in connection with a proceeding in which the specific issue was pending before the executive employee's agency and was directly within the responsibilities of the employee during a period terminating at least 12 months prior to the termination of that employee's employment.

B. No former executive employee may knowingly act as an agent or attorney for, or appear personally before, a state or quasi-state agency for anyone other than the State at any time following termination of the employee's employment with the agency or quasi-state agency in connection with a proceeding in which the specific issue was pending before the executive employee's agency and was directly within the responsibilities of the executive employee during the 12-month period immediately preceding the termination of the employee's employment.

**4. Construction of section.** This section may not be construed to prohibit former state employees from doing personal business with the State. This section shall not limit the application of any provisions of Title 17-A, chapter 25.

**5. Penalty.** A violation of this section is a civil violation for which a forfeiture of not more than \$1,000 may be adjudged.

**6. Application of more stringent statutory provisions.** If other statutory conflict of interest provisions pertaining to any state agency, quasi-state agency or state board are more stringent than the provisions in this section, the more stringent provisions shall apply.

**7. Avoidance of appearance of conflict of interest.** Every executive employee shall endeavor to avoid the appearance of a conflict of interest by disclosure or by abstention. For the purposes of this subsection and subsection 8, "conflict of interest" includes receiving remuneration, other than reimbursement for reasonable travel expenses, for performing functions that a reasonable person would expect to perform as part of that person's official responsibility as an executive employee.

**8. Disclosure of conflict of interest.** An executive employee shall disclose immediately to that employee's direct supervisor any conflict of interest within the meaning of this section.

## 5 §18-A. CONFLICT OF INTEREST; CONTRACT WITH THE STATE

1. **Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "State entity" means any office, department, agency, authority, commission, board, institution, hospital or other instrumentality of the State.

B. "Executive employee" has the same meaning as set forth in section 19, subsection 1, paragraph D except that "executive employee" includes employees of and members serving with the National Guard and employees of the University of Maine System, the Maine Maritime Academy and the state community colleges.

2. **Prohibition.** An executive employee may not have any direct or indirect pecuniary interest in or receive or be eligible to receive, directly or indirectly, any benefit that may arise from any contract made on behalf of the State when the state entity that employs the executive employee is a party to the contract.

3. **Violative contract void.** Any contract made in violation of this section is void.

4. **Exemptions.** This section does not apply:

A. To purchases by the Governor under authority of Title 1, section 814;

B. To contracts made with a corporation that has issued shares to the public for the general benefit of that corporation; or

C. If an exemption is approved by the Director of the Bureau of General Services within the Department of Administrative and Financial Services or the director's designee based upon one of the following and if the director gives notice of the granting of this exemption to all parties bidding on the contract in question with a statement of the reason for the exemption and if an opportunity is provided for any party to appeal the granting of the exemption:

(1) When the private entity or party that proposes to contract with the State and that employs the executive employee, based upon all relevant facts, is the only reasonably available source to provide the service or product to the State, as determined by the director; or

(2) When the director determines that the amount of compensation to be paid to the private entity or party providing the service or product to the State is de minimis.

## 5 §19. FINANCIAL DISCLOSURE BY EXECUTIVE EMPLOYEES

I. **Definitions.** As used in this section, unless the context indicates otherwise, the following terms have the following meanings.

A. "Appointed executive employee" means a compensated member of the classified or unclassified service employed by the Executive Branch, who is appointed by the Governor and confirmed by the Legislature, or who serves in a major policy-influencing position, except assistant attorneys general, as set forth in chapter 71.

B. "Constitutional officers" means the Governor, Attorney General, Secretary of State and Treasurer of State.

C. "Elected executive employee" means the constitutional officers and the State Auditor.

D. "Executive employee" means an appointed executive employee or an elected executive employee.

E. "Gift" means anything of value, including forgiveness of an obligation or debt, given to a person without that person providing equal or greater consideration to the giver. "Gift" does not include:

(1) Gifts received from a single source during the reporting period with an aggregate value of \$300 or less;

(2) A bequest or other form of inheritance; and

(3) A gift received from a relative or from an individual on the basis of a personal friendship as long as that individual is not a registered lobbyist or lobbyist associate under Title 3, section 313, unless the employee has reason to believe that the gift was provided because of the employee's official position and not because of a personal friendship.

F. "Honorarium" means a payment of money or anything with a monetary resale value to a person for an appearance or a speech by the person. "Honorarium" does not include reimbursement for actual and necessary travel expenses for an appearance or speech. "Honorarium" does not include a payment for an appearance or a speech that is unrelated to the person's official capacity or duties.

G. "Immediate family" means a person's spouse or dependent children.

H. "Income" means economic gain to a person from any source, including, but not limited to, compensation for services, including fees, commissions and payments in-kind; income derived from business; gains derived from dealings in property, rents and royalties; income from investments including interest, capital gains and dividends; annuities; income from life insurance and endowment contracts; pensions; income from discharge of indebtedness; distributive share of partnership income; income from an interest in an estate or trust; prizes; and grants, but does not include gifts. Income received in-kind includes, but is not limited to, the transfer of property and options to buy or lease and stock certificates. Income does not include alimony and separate maintenance payments.

I. "Relative" means an individual who is related to the executive employee or the executive employee's spouse as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother or half sister, and shall be deemed to include the fiance or fiancée of the executive employee.

I-1. "Reportable liabilities" means any unsecured loan, except a loan made as a campaign contribution recorded as required by law, of \$3,000 or more received from a person not a relative. Reportable liabilities do not include:

(1) A credit card liability;

(2) An educational loan made or guaranteed by a governmental entity, educational institution or nonprofit organization; or

(3) A loan made from a state or federally regulated financial institution for business purposes.

J. "Self-employed" means that the person qualifies as an independent contractor under Title 39-A, section 102, subsection 13.

**2. Statement of sources of income.** Each executive employee shall annually file with the Commission on Governmental Ethics and Election Practices a statement of finances for the preceding calendar year. The statement must indicate:

A. If the executive employee is an employee of another person, firm, corporation, association or organization, the name and address of the employer and each other source of income of \$1,000 or more;

B. If the executive employee is self-employed, the name and address of the executive employee's business and the name of each source of income derived from self-employment that represents more than 10% of the employee's gross income or \$1,000, whichever is greater, except that, if this form of disclosure is prohibited by statute, rule or an established code of professional ethics, the employee shall specify the principal type of economic activity from which the income is derived. With respect to all other sources of income, a self-employed executive employee shall name each source of income of \$1,000 or more. The employee shall also indicate major areas of economic activity and, if associated with a partnership, firm, professional association or similar business entity, the major areas of economic activity of that entity;

C. The specific source of each gift received;

D. The type of economic activity representing each source of income of \$1,000 or more that any member of the immediate family of the executive employee received and the name of the spouse or domestic partner of the executive employee. The disclosure must include the job title of the executive employee and immediate family members if the source of income is derived from employment or compensation;

E. The name of each source of honoraria that the executive employee accepted;

F. Each executive branch agency before which the executive employee or any immediate family member has represented or assisted others for compensation; and

G. Each executive branch agency to which the executive employee or the employee's immediate family has sold goods or services with a value in excess of \$1,000.

In identifying the source of income, it is sufficient to identify the name and address and principal type of economic activity of the corporation, professional association, partnership, financial institution, nonprofit organization or other entity or person directly providing the income to the individual.

With respect to income from a law practice, it is sufficient for attorneys-at-law to indicate their major areas of practice and, if associated with a law firm, the major areas of practice of the firm.

**2-A. Statement of interests.** Beginning in 2010, each executive employee shall annually file with the Commission on Governmental Ethics and Election Practices a statement of those positions set forth in this subsection for the preceding calendar year. The statement must include:

A. Any offices, trusteeships, directorships or positions of any nature, whether compensated or uncompensated, held by the executive employee with any for-profit or nonprofit firm, corporation, association, partnership or business; and

B. Any offices, trusteeships, directorships or positions of any nature, whether compensated or uncompensated, held by a member of the immediate family of the executive employee with any for-profit or nonprofit firm, corporation, association, partnership or business and the name of that member of the executive employee's immediate family.

**3. Time for filing.**

A. An elected executive employee shall file an initial report within 30 days of his election. An appointed executive employee shall file an initial report prior to confirmation by the Legislature.

B. Each executive employee shall file the annual report prior to the close of the 2nd week in April, unless that employee has filed an initial or updating report during the preceding 30 days; except that, if an

elected or appointed executive employee has already filed a report for the preceding calendar year pursuant to paragraph A, a report does not need to be filed.

C. Each executive employee whose income substantially changes shall file a report of that change within 30 days of it.

**4. Penalties.** Failing to file the statement within 15 days of having been notified by the Commission on Governmental Ethics and Election Practices of failing to meet the requirements of subsection 2 is a civil violation for which a fine of not more than \$100 may be adjudged.

**5. Rules.** The Commission on Governmental Ethics and Election Practices may adopt or amend rules to specify the reportable categories or types and the procedures and forms for reporting and to administer this section.

**6. Public record.** Statements filed under this section are public records. The Commission on Governmental Ethics and Election Practices shall publish on a publicly accessible website the completed forms of executive employees filed under this section.

**7. Disclosure of reportable liabilities.** Each executive employee shall include on the statement of income under subsection 2 all reportable liabilities incurred while employed as an executive employee. The executive employee shall file a supplementary statement with the Commission on Governmental Ethics and Election Practices of any reportable liability within 30 days after it is incurred. The report must identify the creditor in the manner of subsection 2.

## 17 §3104. CONFLICTS OF INTEREST; PURCHASES BY THE STATE

No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the State shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State or of the institution in which he holds such place of trust, and any contract made in violation hereof is void. This section shall not apply to purchases of the State by the Governor under authority of Title 1, section 814.

## 17-A §605. IMPROPER GIFTS TO PUBLIC SERVANTS

1. A person is guilty of improper gifts to public servants if:
  - A. Being a public servant that person solicits, accepts or agrees to accept any pecuniary benefit from a person if the public servant knows or reasonably should know that the purpose of the donor in making the gift is to influence the public servant in the performance of the public servant's official duties or vote, or is intended as a reward for action on the part of the public servant; or
  - B. He knowingly gives, offers, or promises any pecuniary benefit prohibited by paragraph A.
2. Improper gifts to public servants is a Class E crime.

## 17-A §602. BRIBERY IN OFFICIAL AND POLITICAL MATTERS

....

2. As used in this section and other sections of this chapter, the following definitions apply.

....

C. "Pecuniary benefit" means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally. "Pecuniary benefit" does not include the following:

- (1) A meal, if the meal is provided by industry or special interest organizations as part of an informational program presented to a group of public servants;
- (2) A meal, if the meal is a prayer breakfast or a meal served during a meeting to establish a prayer breakfast; or
- (3) A subscription to a newspaper, news magazine or other news publication.

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February 10, 2012

Representative Mark Dion  
2 State House Station  
Augusta, Maine 04333-0002

Dear Representative Dion:

I am writing in response to your letters of January 17, 2012 and January 30, 2012, in which you inquired whether the State Treasurer has engaged in "any business of trade or commerce" within the meaning of the Maine Constitution, art. V, pt. 3, § 3 ("Section 3"). Your question focuses on the Treasurer's ownership of the Popham Beach Club located in Phippsburg, Maine.<sup>1</sup> Subsequent to our receipt of your letters, we became aware that a similar question has been raised concerning the Treasurer's real estate development activities through his company Dirigo Holdings, LLC.

There is very little guidance concerning the proper application of Section 3. The Maine courts have never addressed it. The two Attorney General opinions that have been issued consider the broad question of what is prohibited by Section 3 but do not apply it to any actual fact pattern. The United States Attorney General issued an opinion in 1929 in which he concluded that Secretary of the Treasury Andrew Mellon's ownership of stock was not in violation of a federal statute with language very similar to that of Section 3, but there do not appear to be any subsequent opinions or any judicial analysis of this language. 36 U.S. Op. Atty. Gen. 12 (April 18, 1929).

As a result, it is difficult to predict how a court would address the question before us. The federal authority, as well as the language of Section 3 and Maine statutes governing the Treasurer, supports his ability to continue to hold stocks during his tenure in office, provided that he does not undertake activity on behalf of any entity in which he owns stock. In this regard, we note that in the U.S. Attorney General's 1929 opinion, he commented favorably on Andrew Mellon's ceasing to be an officer or director before he became Secretary of the Treasury and

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<sup>1</sup> While the focus of your inquiry is art. V, pt. 3, § 3 of the Maine Constitution, Title 5, Section 122, of the Maine Revised Statutes, is also relevant to the issue you have raised. This section provides in relevant part: "The condition of the Treasurer of State's bond shall be for the faithful discharge of all the duties of his office, and that during his continuance in office he will not engage in trade or commerce, or act as broker, agent or factor for any merchant or trader..." We note that the bonds now in effect do not expressly address engagement in trade or commerce.

further noted that although he owned stock in a number of corporations, in none of them did he own a majority interest nor did "he give his time or attention to the active conduct of any incorporated business." *Id.* at 3.

## FACTS

A. Popham Beach Club. Our inquiry into the Popham Beach Club (the "Club") reveals the following: The Treasurer, Bruce Poliquin, is the owner of the Club, which is located on a parcel of land located in Phippsburg, Maine. The real estate on which the Club is located also is owned by the Treasurer. All revenues and expenses of the Club are attributed personally to Mr. Poliquin.

The Club employs a manager who is responsible for the day-to-day operation of the Club. The manager's duties include the hiring of personnel, arranging for work at the Club with private contractors and making decisions on membership applications. The manager is not involved with the finances of the Club and does not have a role with regard to local permit applications. The Club has three employees, including a groundskeeper and a bookkeeper. According to the manager, she rarely speaks with Mr. Poliquin and he does not give her direction with regard to the management and operation of the Club. Mr. Poliquin states that he visits the Club infrequently, that he considers the Club to be a "passive investment" and that he has no active involvement in the management of the Club. He has further stated that he does review financial records of the Club.

The Club maintains a checking account; Mr. Poliquin alone has signatory authority for the account. All invoices for the Club are paid from the Club checking account. The real estate taxes on the property are paid from the Club account; all utilities for the Club are in the name of Mr. Poliquin. For any Club initiative, work or invoice not in the ordinary course of business, the bookkeeper or the manager contacts Mr. Poliquin. The Club is not organized as a separate entity and does not file a separate tax return. All expenses of the Club are paid by Mr. Poliquin.

B. Dirigo Holdings, LLC. Dirigo Holdings, LLC, is a Domestic Limited Liability Company organized under the laws of Maine and registered in Maine (the "Company"). Documents on file with the Maine Secretary of State indicate that Bruce L. Poliquin is the Clerk/Registered Agent and that the management of the Company is vested in the members. Mr. Poliquin has stated that he is the sole member of the Company.

The primary business of the Company is the development of the Popham Woods Condominiums located in Phippsburg, Maine. The Phippsburg Real Estate Tax Commitment Book for 2012 lists five properties in the name of the Company, "ATTN: Bruce L. Poliquin, 186 Ledgemere Rd., Georgetown, Maine." Properties at the Popham Woods Condominium are currently being marketed by Allen & Selig Realty. A Site Location Development Order issued by the Maine Department of Environmental Protection issued in April 2007 states that Dirigo Holdings (the "Applicant") planned to develop a 183 acre parcel with a 69-unit condominium development; that the estimated project cost is \$17,279,000; and that the Applicant intended to self-finance the proposed project.

Mr. Poliquin has stated that he periodically provides funds for payment of expenses of Dirigo Holdings and Popham Woods Condominium and that Dirigo Holdings employs a manager and bookkeeper who are responsible for the operation and management of the Company. Mr. Poliquin further states that he periodically consults with the manager and bookkeeper. The bookkeeper for the Company is the bookkeeper for the Popham Beach Club. As is the case with the Popham Beach Club, there is a Company bank account for which Mr. Poliquin alone has signatory authority. Mr. Poliquin is the president of the Popham Woods Condominium Unit Owner's Association.

#### ANALYSIS

Article V, part 3, section 3 provides in its entirety as follows:

The Treasurer shall not, during the treasurer's continuance in office, engage in any business of trade or commerce, or as a broker, nor as an agent or factor for any merchant or trader.

There is no judicial decision construing this provision of the Constitution, which has remained the same since its adoption in 1820. An opinion of the Attorney General dated January 23, 1923 sought to define the key terms in Section 3 with reference to the dictionary and court decisions construing "trade" or "business" in other contexts, and reached this conclusion:

...[O]ne holding the office of treasurer of the State of Maine is prohibited from engaging during his term of office in any business, and by that is meant any occupation or employment pursued as a calling, not of course including the learned professions, in which a person is engaged for procuring subsistence or for profit.

Op. Me. Att'y Gen. (January 23, 1923).

The only other Attorney General opinion we have found on the proper construction of Section 3 was issued in response to a general question from the Treasurer; neither opinion seeks to apply the language of Section 3 to a specific set of facts. This 1978 opinion notes that the original statute authorizing the office of Treasurer contained language similar to that of Section 3 prohibiting engagement in any business of trade. The original laws governing the office of the Treasurer also provided for his removal from office if he was absent from the State or from the duties of his office; these provisions were both grounded in the requirement that the Treasurer give full time to the duties of his office. Op. Me. Att'y Gen. (December 1, 1978) at 2. The language prohibiting the Treasurer from engaging in business was then adopted as part of the Maine Constitution. The opinion concludes:

... [W]e must conclude that the position of Treasurer, by operation of the provisions of Article V, Part 4 [sic], Section 3, requires a full-time commitment and full fidelity to the job such that other employment or the seeking of income through the regular practice

of a profession outside of the office of Treasurer would not appear to be consistent with the intent of the original Constitution.

Op. Me. Att'y Gen. (December 1, 1978) at 2.

The opinion also considers the ability of the Treasurer to receive income from other sources during his tenure in office.

The laws and constitution of the State do not bar the Treasurer from receiving income from other sources during his tenure in office. However, the practices which result in receipt of that income and sources of the income would have to be examined on a case-by-case basis to determine whether the Treasurer was engaging in business to gain the income or whether the source of the income created a conflict of interest for the Treasurer...

*Id.*

The 1929 opinion of the U.S. Attorney General construes language in federal law that is similar to that of Section 3.

No persons appointed to the Office of Secretary of the Treasury, or Treasurer, or Register, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce...

5 U.S.C. § 243 (formerly), see now 31 U.S.C. § 329.<sup>2</sup>

Unlike Section 3, at the time of the U.S. Attorney General's opinion, the federal prohibition applied to direct or indirect interests, and might therefore be read as stricter than the provision in the Maine Constitution. However, the only issue considered in this context was the ability of the Treasurer to own stock, given that before becoming Secretary of the Treasury Mr. Mellon had ceased to be an officer or a director in any corporation, did not own a majority of the stock, and he did not give his time or attention to the active conduct of any incorporated business. 36 U.S. Op. Atty. Gen. 12 (April 18, 1929) at 3. The U.S. Attorney General concluded that the Treasurer could receive income from stocks under these circumstances. We believe it is reasonable to read the language of Section 3 to be consistent with that conclusion.

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<sup>2</sup> Current 31 U.S.C. § 329 reads in pertinent part:

Limitations on outside activities

(a)(1) The Secretary of the Treasury and the Treasurer may not--

(A) be involved in trade or commerce;

(B) own any part of a vessel (except a pleasure vessel);

(C) buy or hold as a beneficiary in trust public property;

(D) be involved in buying or disposing of obligations of a State or the United States Government; and

(E) personally take or use a benefit gained from conducting business of the Department of the Treasury except as authorized by law.

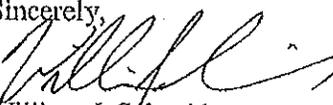
## CONCLUSION

The prohibition in Section 3 of the Constitution is general and without limitation. The history of Section 3 and its predecessor statute demonstrates the intent to require the Treasurer to make a full-time commitment, to give full fidelity to the job of Treasurer, and to preclude him from engaging in or carrying on a trade or business that would divert his attention from this commitment. It is reasonable to conclude that Section 3, like the comparable federal statute, permits the Treasurer to continue to hold personal investments, such as stocks and bonds, while in office, given that there is nothing in the Maine Constitution or in statute that requires divestiture. It is also clear that the Treasurer cannot accept other employment or provide services to others while in office. There is no language, history or precedent identifying any activities the Treasurer may engage in with respect to his personal investments and business ventures without violating Section 3.

With respect to the Treasurer, any activities related to the active management of stock or other ownership interests should be handled by third persons in the absence of any authority suggesting that such activities are acceptable when undertaken directly. During the Treasurer's term in office he should take steps to disassociate himself from the active management of any of the entities in which he is invested and any entities in which he is the sole owner or principal or agent. Furthermore, he should not appear before any governmental bodies on behalf of entities that he owns.

I hope that this information and analysis proves to be useful.

Sincerely,



William J. Schneider  
Attorney General

cc: Bruce, Poliquin, State Treasurer  
Paul LePage, Governor  
Senator Kevin Raye, Senate President  
Representative Bob Nutting, Speaker of the House  
Senator Barry Hobbins, Senate Minority Leader  
Representative Emily Cain, House Minority Leader

# Board of Overseers of Bar v. Warren

## 2011 ME 124

### December 08, 2011

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**Background:** Law firm filed motion to quash subpoena issued by Bar Council for Board of Overseers of the Bar to firm's former general counsel seeking records that firm claimed were protected from disclosure by attorney-client privilege in connection with former general counsel's investigation of firm's former partner for misconduct. Parties agreed to submit dispute to a single justice of the Supreme Judicial Court. The single justice of the Supreme Judicial Court denied motion. Firm appealed. The Supreme Judicial Court, 982 A.2d 330, vacated order and remanded to the single justice. On remand, the single justice, Silver, J., granted firm's motion to quash subpoena. Board appealed, and filed information alleging that members of firm violated bar rules by failing to investigate, discover, and report former partner's misconduct, and failing to mitigate losses to clients and the firm resulting from former partner's misconduct. The single justice of the Supreme Judicial Court, Alexander, J., found in favor of firm. Board appealed.

**Holdings:** The Supreme Judicial Court, Gorman, J., held that:

(1) crime-fraud exception to the attorney-client privilege that existed between firm and its former general counsel did not apply to defeat the privilege;

(2) failure of firm's members to immediately report former partner's misapplication of firm funds to the Board of Overseers of the Bar did not violate bar rule prescribing the mandatory circumstances in which a lawyer is required to report the misconduct of another lawyer; but

(3) failure of firm's members to put any measures into effect to ensure former partner's ethical performance of his duties after it was discovered that former partner had misapplied firm funds violated bar rule requiring law firm partners to make efforts to enact procedures that will deter unethical behavior.

Affirmed in part; vacated in part.

Jabar, J., concurred in part and dissented in part, with opinion.

#### West Headnotes

[1] Bar Council for Board of Overseers of the Bar timely appealed order granting law firm's

motion to quash subpoena issued by Bar Counsel to firm's former general counsel seeking records concerning former general counsel's investigation of firm's former partner for misconduct, as well as judgment concluding that members of firm's executive committee did not commit misconduct in connection with investigating and reporting former partner's misconduct, as the order granting firm's motion to quash subpoena was an interlocutory discovery order, such that Bar Counsel acted appropriately by delaying the appeal until entry of final judgment.

[2] The general rule is that discovery orders are deemed interlocutory and therefore are reviewable only on appeal from the final judgment.

[3] Supreme Judicial Court, on Bar Counsel's appeal of order of single justice of Supreme Judicial Court on remand granting law firm's motion to quash subpoena issued by Bar Counsel to firm's former general counsel seeking records concerning former general counsel's investigation of firm's former partner for misconduct, would not consider whether the lawyer-client privilege protected each document listed on firm's privilege log, as this issue was fully resolved in the single justice's first order denying firm's motion to quash and not challenged by either party during prior appeal, such that parties had no right to ask the single justice to revisit the issue on remand following Supreme Judicial Court's vacation of order denying firm's motion to quash.

[4] Crime-fraud exception to the attorney-client privilege that existed between law firm and its former general counsel did not apply to defeat the privilege, which firm asserted protected from disclosure to Bar Counsel firm documents that Bar Counsel sought concerning former general counsel's investigation of firm's former partner for misconduct, as the firm was not planning or engaged in any fraudulent activity at the time it enlisted former general counsel's help in the investigation, and the firm did not intend to facilitate or conceal any fraudulent or criminal conduct in the communications with former general counsel. Rules of Evid., Rule 502(d)(1).

[5] For the crime-fraud exception to the attorney-client privilege to pierce a client's claim of attorney-client privilege, it must be established that the client was engaged in, or was planning, criminal or fraudulent activity when the attorney-client communications took place, and that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity. Rules of Evid., Rule 502(d)(1).

[6] In an attorney disciplinary proceeding, Supreme Judicial Court interprets the meaning of bar rules de novo as a matter of law.

[7] In an attorney disciplinary proceeding, the Supreme Judicial Court reviews for clear error the findings of fact that determine the applicability of a bar rule.

[8] Failure of law firm's managing partner and members of its executive committee to immediately report former partner's misapplication of firm funds to the Board of Overseers of the Bar did not violate bar rule prescribing the mandatory circumstances in which a lawyer is required to report the misconduct of another lawyer, as neither managing partner nor members of executive committee believed that the perceived-to-be aberrational misapplication of firm funds from one account by the former partner was an action that, in light of former partner's 30-year history with the firm, raised a substantial question as to his honesty, trustworthiness, or fitness as a lawyer. Bar Rule 3.2(e)(1) (2008).

[9] Failure of law firm's managing partner and members of its executive committee to put any measures into effect to ensure partner's ethical performance of his duties after it was discovered that partner had misapplied firm funds by writing checks from client account to himself rather than to firm violated bar rule requiring law firm partners to make efforts to enact procedures that will deter unethical behavior. Bar Rule 3.13(a)(1) (2008).

[10] Delay of law firm's managing partner and members of its executive committee in reporting to Board of Overseers of the Bar partner's unethical conduct that included misapplication of firm funds, billing clients for work he had not performed, and taking money from client accounts to "pay" himself did not violate bar rule imposing on partners and supervising attorneys a duty to prevent or rectify the harm actually caused by a violation of the bar rules if they learn of the harm at a point when there is still an opportunity to take corrective action, as there were no consequences from the delay in reporting that could have been avoided or mitigated. Bar Rule 3.13(a)(1) (2008).

## ETHICAL RULES AT ISSUE IN *BD. BAR OVERSEERS V. WARREN*

### 1. **Maine Bar Rule 3.2(e)(1):**

A lawyer possessing unprivileged knowledge of a violation of the Maine Bar Rules that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall report such knowledge to the appropriate disciplinary or investigative authority.

#### Compare **Maine Rule of Professional Conduct 8.3, Reporting Professional Misconduct**

(a) A lawyer who knows that another lawyer has committed a violation of the Maine Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate professional authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in the Maine Assistance Program for Lawyers, or an equivalent peer assistance program approved by a state's highest court.

### 2. **Maine Bar Rule 3.13(a):**

(a) Responsibilities of a Partner or Supervisory Lawyer.

(1) **A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Code of Professional Responsibility.**

(2) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure the other lawyer conforms to the Code of Professional Responsibility.

(3) **A lawyer shall be responsible for another lawyer's violation of the Code of Professional Responsibility if:**

(i) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(ii) **the lawyer is a partner in the law firm, in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

**Compare Maine Rule of Professional Conduct Rule 5.1:**

**5.1 Responsibilities of Partners, Managers, and Supervisors**

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

STATE OF MAINE  
SUPREME JUDICIAL COURT  
AMENDMENTS TO  
THE MAINE BAR RULES

2012 Me. Rules 05

Effective: January 1, 2012

All of the Justices concurring therein, the following amendments to the Maine Bar Rules are hereby adopted to be effective on the date indicated above. The specific rules amendments are stated below. To aid in understanding of the amendments, an Advisory Committee Note appears after the text of each amendment. The Advisory Committee Note states the reason for recommending the amendment, but it is not part of the amendment adopted by the Court.

1. Rule 10(b) of the Maine Bar Rules is amended to read as follows:

(b) **Failure of Payment.** Any attorney who fails to pay the fee required under subdivision (a) of this rule with the annual registration statement by August 31 is automatically suspended. Notice of the suspension shall be given by the Board by registered or certified mail, and return receipt requested, addressed to the office or home address last known to the Board. Such suspension shall not be effective until thirty (30) days after the date of mailing the notice thereof. The failure to pay shall not be considered a violation of the ~~Code of Professional Responsibility~~ Maine Rules of Professional Conduct per se and the suspension for failure to pay shall not constitute the imposition of discipline. Any suspension pursuant to this subdivision shall be subject to Maine Bar Rules 7.3(i)(2) and 7.3(j)(4). An attorney who, after the date of the mailing of such notice of suspension but before the effective date of such suspension, pays the annual fee as required under subdivision (a) of this rule and receives from the Board acknowledgement of such payment, shall be deemed to be in compliance with this rule and shall not be suspended for failure to pay such fee. An attorney aggrieved as a result of a suspension may apply to the Board Chair for summary relief for good cause shown.

### Advisory Note – November 2011

The proposed amendment to Maine Bar Rule 10(b) deletes reference to the Code Professional Responsibility that was abrogated and replaced by the Maine Rules of Professional Conduct effective August 1, 2009.

2. Rule 12(a)(1) of the Maine Bar Rules is amended to read as follows:

(1) Except as otherwise provided in this subdivision, every attorney required to register in accordance with these rules of this state shall complete 11 credit hours of approved continuing legal education in each calendar year beginning January 1, 2001. At least one credit hour in each calendar year shall be primarily concerned with professionalism education issues of ethics or professional responsibility. Qualifying professionalism education topics include professional responsibility, legal ethics, substance abuse and mental health issues, diversity awareness in the legal profession, and malpractice and bar complaint avoidance topics including law office and file management, client relations, and client trust account administration. If an attorney is subject to this rule for more than 3 months of a calendar year but for less than the entire year, the number of credits required for that year shall be prorated according to the number of full months of the year in which the attorney is subject to this rule. However, an attorney who has registered in emeritus attorney status is required to complete only seven credit hours of approved continuing legal education in each calendar year beginning January 1, 2005, unless exempted from the requirements of continuing legal education as provided by Maine Bar Rule 12(a)(5)(F).

### Advisory Note – November 2011

The amendment to Bar Rule 12(a)(1) clarifies the types of continuing legal education courses that may qualify for the annually required one hour of “ethics” credit.

3. These amendments shall take effect on January 1, 2012.

Dated: December 13, 2011

FOR THE COURT<sup>1</sup>

/S/

LEIGH I. SAUFLEY  
Chief Justice

DONALD G. ALEXANDER  
JON D. LEVY  
WARREN M. SILVER  
ANDREW M. MEAD  
ELLEN A. GORMAN  
JOSEPH M. JABAR  
Associate Justices

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<sup>1</sup> This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.

STATE OF MAINE  
SUPREME JUDICIAL COURT  
AMENDMENTS TO  
MAINE RULES OF PROFESSIONAL CONDUCT

2012 Me. Rules 06

Effective: January 1, 2012

All the justices concurring therein, the following amendments to the Maine Rules of Professional Conduct are hereby adopted to be effective on the date indicated above. The specific rules amendments are stated below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending each amendment, but it is not part of the amendment adopted by the Court.

1. Rule 1.15(f) of the Maine Rules of Professional Conduct is amended as follows:

(f) Upon termination of representation, a lawyer ~~or a lawyers successor~~, shall return to the client or retain and safeguard in a retrievable format all information and data in the lawyer's possession to which the client is entitled. Unless information and data are returned to the client or as otherwise ordered by a court, the lawyer shall retain and safeguard such information and data for a minimum of eight (8) years, except for client records in the lawyer's possession that have intrinsic value in the particular version, such as original signed documents, which must be retained and safeguarded until such time as they are out of date and no longer of consequence. A lawyer may enter into a voluntary written agreement with the client for a different period. In retaining and disposing of files, a lawyer shall employ means consistent with all other duties under these rules, including the duty to preserve confidential client information.

**Advisory Note – November 2011**

The deleted phrase clarifies that Rule 1.15(f) pertains to an attorney's responsibilities to a former client when the attorney-client relationship ends. In circumstances when a proxy is appointed, M. Bar R. 7.3(f) governs.

2. Rule 1.16(d) of the Maine Rules of Professional Conduct is amended as follows:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, ~~such as including giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fees or expenses that has not been earned or incurred, and complying with Rule 1.15(f) concerning the information and data to which the client is entitled.~~ The lawyer may retain papers relating to the client to the extent permitted by other law.

#### Advisory Note – November 2011

The changes to Rule 1.16(d) render it consistent with Rule 1.15(f), as both rules apply to an attorney's responsibilities when the attorney-client relationship terminates. The changes to Rule 1.16(d) invite the attorney to consult Rule 1.15(f) concerning the disposition and retention of information and data in the lawyer's possession to which the client is entitled.

3. Rule 3.1 of the Maine Rules of Professional Conduct is amended as follows:

#### MERITORIOUS CLAIMS AND CONTENTIONS

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a non-frivolous basis in law and fact for doing so, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer shall not report or threaten to report misconduct to a criminal, administrative or disciplinary authority solely to obtain an advantage in a civil matter.

### Advisory Note – November 2011

This Amendment addresses a transitional issue from the former Bar Rules to the Maine Rules of Professional Conduct. Former Maine Bar Rule 3.6(c) proscribed threatening prosecution: “A lawyer shall not present, or threaten to present, criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter.” The ABA Model Rules of Professional Conduct do not directly prohibit this conduct. ABA Formal Ethics Opinions 92-363 and 94-383 suggest the conduct is addressed by Model Rules 3.1 and 4.1(a) & (b). The omission of explicit language in the Maine Rules of Professional Conduct by the Ethics 2000 Task Force was not to be read as condoning the previously proscribed conduct. This addition of subsection (b) gives expression to the continuing prohibition. The rule as promulgated clarifies that prosecutors may engage in good faith negotiations to resolve multiple related matters.

4. These amendments shall be effective January 1, 2012.

Dated: December 13, 2011

FOR THE COURT<sup>1</sup>

/S/

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LEIGH I. SAUFLEY  
Chief Justice

DONALD G. ALEXANDER  
JON D. LEVY  
WARREN M. SILVER  
ANDREW M. MEAD  
ELLEN A. GORMAN  
JOSEPH M. JABAR  
Associate Justices

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<sup>1</sup> This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

## ABA Commission on Ethics 20/20 Introduction and Overview

The ABA Commission on Ethics 20/20 respectfully submits to the House of Delegates the accompanying Resolutions and Reports. They are the product of a three-year study of how globalization and technology are transforming the practice of law and how the regulation of lawyers should be updated in light of those developments. As we neared the end of our work, we decided that, to better facilitate the House of Delegates' consideration of the issues, the Commission should split its recommendations to the House into two sets of proposals. The first six proposals are set forth here; the Commission will decide later this year which additional recommendations it will ask the House of Delegates to consider in February 2013.

As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission")<sup>1</sup> and the ABA Commission on Multijurisdictional Practice ("MJP Commission").<sup>2</sup> Those Commissions, the ABA House of Delegates, and the ABA Center for Professional Responsibility performed an invaluable service to the profession, clients, and the public by developing, adopting, and implementing those recommendations.

Technology and globalization have transformed the practice of law in ways the profession could not anticipate in 2002. Since then, communications and commerce have become increasingly globalized and technology-based.<sup>3</sup> In August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to tackle the ethical and regulatory challenges and opportunities arising from these 21<sup>st</sup> century realities. She charged the Commission with conducting a plenary assessment of the ABA Model Rules of Professional Conduct and related ABA policies, and directed it to follow these principles: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.<sup>4</sup>

<sup>1</sup> See ABA Commission on Evaluation of the Model Rules of Professional Conduct (Ethics 2000 Commission), [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html).

<sup>2</sup> See ABA Commission on Multijurisdictional Practice, [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission\\_on\\_multijurisdictional\\_practice.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html).

<sup>3</sup> Sucharita Mulpuru et al., *U.S. Online Retail Forecast, 2010 to 2015*, Forrester Research, Inc. (2011) (finding that, in 2010, U.S. online retail sales grew 12.6%, reaching \$176.2 billion and that, by 2015, they are expected to reach \$278.9 billion). See also Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 *Hastings L.J.* (forthcoming May 2012).

<sup>4</sup> See *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT* (1992), [http://www.abanet.org/cpr/reports/mckay\\_report.html](http://www.abanet.org/cpr/reports/mckay_report.html). While the Model Rules for Lawyer Disciplinary Enforcement retain the "self-regulation" terminology, the U.S. legal profession is primarily regulated by each jurisdiction's highest court of appellate jurisdiction. The ABA has long supported this form of regulation of the U.S. legal profession.

Our work product has taken four forms.

- First, we developed the accompanying Resolutions and Reports.
- Second, we filed with the House of Delegates Informational Reports on “Lawyer and Law Firm Ratings and Rankings” as well as on “Alternative Litigation Finance.” The Commission is developing an informational report about alternative law practice structures.
- Third, we referred specific topics to ABA entities with the necessary expertise to address them, *e.g.*, asking the Center for Professional Responsibility to report on constitutional issues associated with lawyer advertising rules in a digital age and requesting the Standing Committee on Ethics and Professional Responsibility to develop ethics opinions on several topics.<sup>5</sup>
- Finally, because globalization and technology are evolving at such a rapid pace, we have recommended that the Center for Professional Responsibility coordinate with other ABA entities to establish centralized and up-to-date websites to help lawyers address critical and constantly evolving ethical and other issues relating to technology and outsourcing.

We do not recommend changes to our basic regulatory construct. Some commentators have suggested that state-based judicial regulation of the profession is unworkable in the modern environment.<sup>6</sup> The Commission concluded, as did the MJP Commission before it, that those advocating for a departure from state-based judicial regulation of the legal profession in the U.S. had not made their case and, indeed, that there remain strong reasons to maintain our state-based system of judicial regulation.<sup>7</sup>

### The Commission’s Process

At its first meeting in September 2009, the Commission agreed that transparency, broad outreach and opportunities for frequent input into its work would be crucial. In November 2009, the Commission released its Preliminary Issues Outline,<sup>8</sup> and subsequently released for comment a

<sup>5</sup> Specific information regarding these referrals can be viewed at the Commission’s website at [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html).

<sup>6</sup> See *e.g.* Comments of the Association of Professional Responsibility Lawyers to the ABA Commission on Ethics 20/20 (April 4, 2011), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/associationofprofessionalresponsibilitylawyers\\_issuespaperconcerningmultijurisdictionalpractice.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/associationofprofessionalresponsibilitylawyers_issuespaperconcerningmultijurisdictionalpractice.authcheckdam.pdf); Comments of the Association of Corporate Counsel to the ABA Commission on Ethics 20/20 (July 2010), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/associationofcorporatecounsel\\_inboundforeignlawyermemorandaandtemplate.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/associationofcorporatecounsel_inboundforeignlawyermemorandaandtemplate.authcheckdam.pdf). The Commission also studied competition authority and consumer movements abroad that have pushed for structural change from outside of the profession, including consumer claims of dissatisfaction with access to legal services and disciplinary enforcement.

<sup>7</sup> See ABA Comm’n on Multijurisdictional Practice Report to the House of Delegates: Report 201A (2002), <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201a.authcheckdam.pdf>.

<sup>8</sup> ABA Commission on Ethics 20/20 Preliminary Issues Outline (November 19, 2009), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/preliminary\\_issues\\_outline.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf).

wide range of documents, including issues papers, draft proposals, and drafts of Informational Reports. We held eleven open meetings where audience members participated; conducted public hearings and roundtables, domestically and abroad; created webinars and podcasts; received and reviewed over 350 written and oral comments from the bar, the judiciary, and the public. To date we have made more than 100 presentations about our work, including presentations to the Conference of Chief Justices, the House of Delegates, ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, and local, state, and international bar associations.

The Commission created seven Working Groups with participants from relevant ABA and outside entities.<sup>9</sup> Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Section of Litigation, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Section of Law Practice Management, and the National Organization of Bar Counsel. The Commission thanks the individuals from these entities for their time, expertise and wisdom.

We are grateful for the truly global input received from the profession and the public, and thank all individuals, organizations and bar associations that identified issues that needed to be addressed and offered possible ways of addressing those issues. All of those comments, testimony, and suggestions helped shape the Commission's work.

### Changes in How We Practice

The Commission's Resolutions and supporting Reports respond to two important trends. First, technology has irrevocably changed and continues to alter the practice of law in fundamental ways. Legal work can be, and is, more easily disaggregated; business development can be done with new tools; and new processes facilitate legal work and communication with clients.<sup>10</sup> Lawyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve. Second, coupled with technology, globalization continues to transform the legal marketplace, with more clients confronting legal problems that cross jurisdictional lines and more lawyers needing to respond to those client needs by crossing borders (including virtually) and relocating to new jurisdictions. Together, these trends have fueled and continue to spur dramatic changes to the legal profession and have given rise to new ethics issues that the Commission's proposals seek to address.<sup>11</sup>

<sup>9</sup> Those Working Groups were tasked with studying and developing recommendations regarding the following topics: Implications of New Technologies; Domestic and International Outsourcing; Conflicts of Interest, Uniformity, and Choice of Law; Alternative Litigation Financing; Law Firm Ratings and Ranking; Alternative Law Practice Structures; and Inbound Foreign Lawyers.

<sup>10</sup> See, e.g., Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 Fordham L. Rev. 2137 (2010).

<sup>11</sup> See generally NEIL RICKMAN & JAMES M. ANDERSON, *INNOVATIONS IN THE PROVISION OF LEGAL SERVICES IN THE UNITED STATES: AN OVERVIEW FOR POLICYMAKERS* (Rand 2012).

These trends are attended by economic forces, especially the movement of capital into new areas, e.g., investment in law firm equity in countries that permit such investment; alternative financing of litigation; and unbundling and outsourcing many of the services that once formed the pyramid of services performed by traditional law firms. The economic pressures are dynamic and varied. They amplify the challenges our profession must confront in a technologically advanced and globalized era. These trends and forces also foster uncertainty about where the profession is headed, and what opportunities lawyers, especially younger ones, will have to perform professional services and earn a livelihood.

### *Technology*

Technology affects nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and market legal services. Even more fundamentally, technology has transformed the delivery of legal services by changing where and how those services are delivered (e.g., in an office, over the Internet or through virtual law offices), and it is having a related impact on the cost of, and the public's access to, these services.

Several developments are particularly notable. In the past, lawyers communicated with clients by telephone, in person, by facsimile or by letter. Lawyers typically stored client confidences in paper form, often inside locked file cabinets, behind locked office doors or in offsite storage facilities. Even when confidential client information was maintained electronically, the information was stored on desktop computers that remained within the firm or on servers typically located in the same office. Today, lawyers regularly communicate with clients electronically, and confidential information is stored on mobile devices, such as laptops, tablets, smartphones, and flash drives, as well as on law firm and third-party servers (i.e., in the "cloud") that are accessible from anywhere.<sup>12</sup> This shift has had many advantages for lawyers and their clients, both in terms of cost and convenience. However, because the duty to protect this information remains regardless of its location, new concerns have arisen about data security and lawyers' ethical obligations to protect client confidences.

Technology is also having a related impact on how lawyers conduct investigations, engage in legal research, advise their clients, and conduct discovery.<sup>13</sup> These tasks now require lawyers to have a firm grasp on how electronic information is created, stored, and retrieved. For example, lawyers need to know how to make and respond to electronic discovery requests and to advise their clients regarding electronic discovery obligations.<sup>14</sup> Legal research is now regularly and often more efficiently conducted online.<sup>15</sup> These developments highlight the importance of keeping abreast of changes in relevant technology in order to ensure that clients receive competent and efficient legal services.

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<sup>12</sup> ABA, LEGAL TECHNOLOGY SURVEY REPORT: EXECUTIVE SUMMARY 18-22 (2011) (documenting lawyers' usage of various devices and noting changes over time).

<sup>13</sup> ABA, LEGAL TECHNOLOGY SURVEY REPORT Vol. III 52-56 (2011) (reporting the results of a survey documenting the pervasive need to use and respond to electronic discovery).

<sup>14</sup> See, e.g., Fed. R. Civ. P. 26(b)(2)(B) & 26(f)(3)(C).

<sup>15</sup> ABA, LEGAL TECHNOLOGY SURVEY REPORT: EXECUTIVE SUMMARY 81-89 (2011) (reporting the results of a survey of lawyers that found that nearly 80% of respondents start their legal research by going to online sources; and that fewer than half of respondents use print materials regularly).

In some situations, a matter may require the use of technology that is beyond the ordinary lawyer's expertise. For example, electronic discovery may require a sophisticated knowledge of how electronic information is stored and retrieved. Thus, another development associated with technology is that lawyers are increasingly disaggregating work by retaining other lawyers and nonlawyers outside the firm (i.e., outsourcing work to lawyers and nonlawyers) to perform critical tasks. Technology also permits the integration of these otherwise disaggregated workstreams, encouraging clients and lawyers to outsource elements of a representation.

Technology is changing the way that clients find lawyers. The Internet provides immediate access to information about lawyers through search engines, websites, blogs, and ratings and rankings services.<sup>16</sup> Lawyers are using various Internet-based client development tools, such as pay-per-click and pay-per-lead services,<sup>17</sup> as well as social and professional networking sites.

Technology continues to reshape the form of law offices and change how legal services are delivered. Some firms now exist solely online as virtual law practices.<sup>18</sup> Other firms exist as continuously evolving collaborations of lawyers who come together to handle discrete legal matters for particular clients.<sup>19</sup> Firms use online law practice management systems that are inexpensive and particularly useful to solo practitioners and lawyers in small firms.<sup>20</sup> The Internet also has enabled clients to access law-related services at a very low cost through websites that are not run by lawyers, creating new competitive pressures and potentially transformative consequences for the practice of law.<sup>21</sup>

Technology also has given rise to an increasing number of cross-jurisdictional issues. Lawyers can easily provide legal services to clients wherever they may be. This ability to provide services virtually has raised new ethical issues.

### *Globalization and Cross-Jurisdictional Practice*

Technology has facilitated the increasing globalization of the economy generally and the legal services marketplace specifically.<sup>22</sup> Clients regularly expect lawyers in firms of all sizes to

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<sup>16</sup> See generally ABA Standing Comm. on the Delivery of Legal Services, *Perspectives on Finding Personal Legal Services* (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/20110228\\_aba\\_harris\\_survey\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/20110228_aba_harris_survey_report.authcheckdam.pdf).

<sup>17</sup> See, e.g., N.J. Sup. Ct. Comm. on Att'y Advertising, *Internet Advertising, Misleading Content, and Impermissible Referral Services*, Ethics Op. 43 (2011); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 897 (2011).

<sup>18</sup> See generally STEPHANIE L. KIMBRO, *VIRTUAL LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES ONLINE* (2010).

<sup>19</sup> See, e.g., Axiom Law, <http://www.axiomlaw.com/index.php/overview> (last visited April 26, 2012). See also Regan & Heenan, *supra* note 10.

<sup>20</sup> *Supra* note 18, at 3-4.

<sup>21</sup> See generally RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008) (describing how technology is revolutionizing the delivery of legal services and predicting how those changes will affect the legal profession in the future).

<sup>22</sup> See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE 21<sup>ST</sup> CENTURY* (2005). See also Laurel S. Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 Nw. J. Int'l L. & Bus. 527 (2008); Susskind, *supra* note 21.

handle matters that involve multiple jurisdictions, domestic and international.<sup>23</sup> For example, in family law matters, lawyers increasingly must address issues involving a spouse who is a citizen of another jurisdiction, domestic or foreign, or assets that are located in another U.S. jurisdiction or country.<sup>24</sup> Many business clients operate in multiple jurisdictions. An Internet-based company may encounter legal issues throughout the country or the world simply as a result of its online presence.

Globalization has not only affected the broader economy, producing more matters that impact multiple jurisdictions, but it also has affected legal employment and professional mobility. A decade ago, the MJP Commission found that, “The explosion of technology and the increasing complexity of legal practice have resulted in the need for lawyers to cross state borders to afford clients competent representation.”<sup>25</sup> In response to this practice reality, the MJP Commission proposed – and the ABA House of Delegates adopted – a regulatory framework that allowed lawyers, subject to certain limitations, to practice law on a temporary basis in jurisdictions in which they were not otherwise authorized to do so.<sup>26</sup> That framework included mechanisms that allowed lawyers, sometimes with limitations, to establish an ongoing practice in a jurisdiction in which they were not otherwise authorized to practice, without the necessity of sitting for a written bar examination.<sup>27</sup> This framework has been widely adopted<sup>28</sup> and has enabled lawyers to represent their clients more effectively and efficiently, provided clients with more freedom regarding their choice of counsel, and afforded lawyers more personal and professional flexibility.

We reviewed this framework in light of the accelerated pace of change and the growing proportion of legal work that involves more than one U.S. jurisdiction. Unsurprisingly, we found that the U.S. legal employment market has been affected by the same forces that have made employment throughout the broader economy more tenuous and unpredictable. As a result, both newer and more experienced lawyers regularly seek employment outside their original jurisdiction of licensure, sometimes because of personal needs, including the relocation of a

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<sup>23</sup> See, e.g., Emile Loza, *Attorney Competence, Ethical Compliance, and Transnational Practice*, 52 *The Advocate*, no. 10, 2009 at \*28, available at <http://isb.idaho.gov/pdf/advocate/issues/adv09oct.pdf>.

<sup>24</sup> See, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families*, 44 *Fam. L.Q.* 4 (2011); Allison Maxim, *International Parental Child Abduction: Essential Principles of the Hague Convention*, Vol. LXIX *Bench & Bar of Minnesota*, no. IV (2012).

<sup>25</sup> See Report of the ABA Commission on Multijurisdictional Practice, *Client Representation in the 21<sup>st</sup> Century* (2002),

[http://www.americanbar.org/content/dam/aba/migrated/final\\_mjp\\_rpt\\_121702\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_121702_2.authcheckdam.pdf).

<sup>26</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (2011) [hereinafter Model Rule XX]; ABA MODEL RULE FOR PRO HAC VICE ADMISSION.

<sup>27</sup> See, e.g., MODEL RULE 5.5(d); ABA MODEL RULE FOR ADMISSION BY MOTION.

<sup>28</sup> For example, since August 2002, forty-four jurisdictions have adopted some form of multijurisdictional practice that is similar to Model Rule 5.5. Chart, *State Implementation of ABA Model Rule 5.5* (2010), [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick\\_guide\\_5\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf). Forty jurisdictions have adopted a version of the ABA Model Rule on Admission by Motion. Chart, *Comparison of ABA Model Rule on Admission by Motion With State Versions* (2011), [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission\\_motion\\_comp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf). Thirty-one jurisdictions have adopted a version of the Model Rule for the Licensing and Practice of Foreign Legal Consultants. Chart, *Foreign Legal Consultant Rules* (2010) [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for\\_legal\\_consultants.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for_legal_consultants.authcheckdam.pdf).

spouse or the loss of a job, but also because of client demands.<sup>29</sup> Consequently, several ethical issues are arising with greater frequency, such as how conflicts of interest should be detected when lawyers seek new employment and how to better facilitate admission in a new jurisdiction while protecting clients and the public.

These same trends, and related demographic shifts within the U.S., also have produced more legal work that involves foreign law and foreign jurisdictions. In 2000, the foreign-born population in the U.S. was 31,107,899. Between 1990 and 2000, every jurisdiction except five had at least a 30% increase in the number of foreign born residents.<sup>30</sup> By 2009, the total U.S. foreign born population had risen to 36,750,000, approximately 12% of the U.S. population.<sup>31</sup> Foreign-born residents have family law, estate planning, and business relationships in their countries of origin or the countries of origin of their spouses or business associates. Foreign-owned companies are involved in multinational litigation that involves U.S. courts and in cross-border transactions and regulatory issues.

In light of these changes, we concluded that additional modifications to the Model Rules and other policies are necessary. These changes will help lawyers continue to ethically serve their clients, who rightfully expect their lawyers to respond nimbly to legal problems that arise in a 21<sup>st</sup> century marketplace.

## SUMMARY OF COMMISSION PROPOSALS

The Commission on Ethics 20/20 believes that the principles underlying the Model Rules of Professional Conduct remain relevant and valid, so most of our recommendations are clarifications and expansions of the Model Rules as well as other existing Model Court Rules and policies.<sup>32</sup> In developing these recommendations, the Commission sought to address the needs of clients and lawyers in a technology-driven global economy while protecting the public and our system of justice. The Commission is presenting the accompanying Resolutions by subject matter rather than by Rule because the context in which they were developed is crucial to understanding their substance.

### *Technology and Confidentiality*

As noted above, technology has transformed how lawyers communicate with their clients and store their clients' confidences. This shift has created new concerns and questions about

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<sup>29</sup> See, e.g., Ronit Dinovitzer et al., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 54-60 (Am. Bar Found. & NALP Foundation for Law Career Research and Education 2009), <http://www.americanbarfoundation.org/publications/338>; ABA Resolution 108 (Feb. 2012), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2012\\_hod\\_midyear\\_meeting\\_108.doc](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_108.doc).

<sup>30</sup> U.S. Census Bureau, *Census 2000 Brief, The Foreign-Born Population: 2000*, at 3 (Dec. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> & U.S. Census Bureau, *Profile of Selected Social Characteristics: 2000* (2000), [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_00\\_SF3\\_DP2&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF3_DP2&prodType=table).

<sup>31</sup> See Table 40, Native and Foreign-Born Populations by Selected Characteristics: 2009, <http://www.census.gov/compendia/statab/2011edition.html>.

<sup>32</sup> Also, because technology outpaces the process by which Resolutions are developed and brought to the House of Delegates, the Commission's recommendations include those described at page 2 above.

lawyers' obligations, including their duty to protect confidential information. The following proposals are intended to offer lawyers the guidance that they need.

- Because new modes of communication create challenges as lawyers try to fulfill their obligation to protect client confidences, a new paragraph (c) in Model Rule 1.6 (Confidentiality of Information), as well as new language in Comment [16], would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. This obligation is referenced in existing Comments [16] and [17], but we concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter of Rule 1.6 and described in more detail through additional Comment language.

The Commission recognizes that lawyers cannot guarantee electronic security any more than lawyers can guarantee the physical security of documents stored in a file cabinet or offsite storage facility. Our proposal would not impose upon lawyers a duty to achieve the unattainable. Instead, it identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable. The factors, which include the cost of the safeguards and the sensitivity of the information, recognize that each client, lawyer or law firm has distinct needs and that no single approach should be or can be applied to the entire legal profession. The proposal makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.

The Commission is also proposing that the ABA create and maintain a regularly updated user-friendly website to provide more specific and timely guidance than the Model Rules can provide regarding lawyers' use of commonly encountered technology. The Commission believes that the proposed amendments to Model Rule 1.6, along with the website, will ensure that lawyers understand their ethical obligations to protect client confidences in a digital age and give them sufficient guidance to fulfill that obligation.

- Because of the sometimes bewildering pace of technological change, the Commission believes that it is important to make explicit that a lawyer's duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] of Model Rule 1.1 (Competence) implicitly encompasses that obligation, but it is important to make this duty explicit because technology is such an integral – and yet at times invisible – aspect of contemporary law practice. The phrase “including the benefits and risks associated with relevant technology” would offer greater clarity regarding this duty and emphasize the growing importance of technology to modern law practice. As noted in ethics opinions, such as those relating to cloud computing,<sup>33</sup> this obligation is not new. Rather, the proposed amendment emphasizes that a lawyer should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent in a digital age.

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<sup>33</sup> See, e.g., Ala. State Bar Office of Gen. Counsel, Formal Op. 2010-02 (2010); Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 09-04 (2009); and N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 842 (2010).

- Model Rule 4.4 (Respect for Rights of Third Persons) and its Comments currently describes a lawyer's obligations when in receipt of inadvertently disclosed "documents," a word that has left lawyers with limited guidance when they receive inadvertently sent electronic information. To address this important ambiguity, the Commission is proposing to add language to Model Rule 4.4 to make clear that electronically stored information, in addition to information existing in paper form, can trigger Rule 4.4(b)'s notification requirements if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase "inadvertently sent" in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise, including when they receive metadata that was inadvertently sent in an electronic document. The Commission believes that these updates to the Rule will provide more guidance to lawyers who now regularly receive misdirected information, particularly information contained in electronic form.
- The screening of individual lawyers from access to certain information in a firm must now address not only documents but also electronic information. Amendments to Comment [9] of Model Rule 1.0 (Terminology) would make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. This proposal recognizes that advances in technology have made client information more accessible to the whole firm, so the process of limiting access to this information should require more than placing relevant physical documents in an inaccessible location; it necessarily requires appropriate treatment of electronically stored information as well.
- The Commission also proposes to update the existing definition of a "writing" in paragraph (n) of Model Rule 1.0 (Terminology) by replacing the word "e-mail" with the phrase "electronic information." This change will ensure that the definition more accurately reflects the various ways that a "writing" can occur, both today and in the future.
- The last sentence of Comment [4] to Model Rule 1.4 – which currently says that, "[c]lient telephone calls should be promptly returned or acknowledged" – has become overtaken by technology. The Commission would replace that admonition with the following language: "Lawyers should promptly respond to or acknowledge client communications."

### *Technology and Client Development*

As lawyers use new marketing services – such as law firm websites, blogs, social and professional networking sites, pay-per-click ads, pay-per-lead services, and online videos – they are encountering a wide range of ethics-related issues. We examined these issues and concluded that the principles underlying the existing Rules – preventing false and misleading advertising, protecting the public from the undue influence of solicitations, and safeguarding the confidences of prospective clients – remain valid. However, specific language in the Rules should be updated to provide necessary guidance.

- When a lawyer's first substantive contact with a potential client was face-to-face, it was relatively easy to determine when a communication gave rise to a prospective client-lawyer

relationship. Now such a relationship can arise in many different ways: a lawyer's website might ask a person to send information about his injury; a lawyer might exchange information with someone on a blog; and a lawyer might use her social networking page to provide advice to "friends."

The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship through amendments to Model Rule 1.18 (Duties to Prospective Client) and its Comments, including a new Comment [3]. The current Rule requires a "discussion," which implies a two-way verbal exchange (e.g., an in-person meeting or telephone conversation), and does not capture the idea that Internet-based communications can, in some situations, give rise to a prospective client relationship.<sup>34</sup> We propose to replace "discusses" with "consults" and include new Comment language that identifies the circumstances under which a "consultation" triggers Rule 1.18's duties. These amendments will help lawyers identify the precautions that they should take to prevent the inadvertent creation of a prospective client-lawyer relationship in a digital age and help the public understand the consequences of communicating electronically with a lawyer. The Comment would also make clear that a person who communicates with a lawyer to disqualify that lawyer from a matter is not a prospective client.

- New marketing tools allow lawyers to pay to have their names listed in response to Internet-based queries by people who use certain search terms as well as through other methodologies. Because the application of the Rules to these new forms of Internet-based client development is sometimes unclear, the Commission concluded that lawyers need better guidance.

For example, confusion arises out of the prohibition against paying others for a "recommendation." Model Rule 7.2 (Advertising) was designed to prohibit a lawyer from paying others – such as "runners" or "cappers" – to recommend them. The Commission's proposal explains how the prohibition applies to modern forms of client development, clarifying that a recommendation occurs when someone endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. This definition, along with additional language in Comment [5], is intended to ensure that the public is not misled when lawyers use tools such as pay-per-click and pay-per-lead services, and that the restrictions on fee sharing with nonlawyers are observed.

- Amendments to the title and text of Model Rule 7.3 (Direct Contact with Prospective Clients) and its Comments would clarify when a lawyer's online communications constitute the type of direct "solicitations" that are governed by the Rule. For example, proposed language in Comment [1] notes that advertisements automatically generated in response to a person's Internet searches about legal issues are not "solicitations."

### *Lawyer Mobility*

Traditionally, lawyers practiced in a single jurisdiction for their entire careers and had little need to relocate to other jurisdiction or serve clients who had multijurisdictional needs. Times have

<sup>34</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) at 4.

changed. Globalization and technology have transformed the legal marketplace and fueled more cross-border practice and lawyer mobility.

- In today's legal marketplace, lawyers licensed in one U.S. jurisdiction more frequently need to relocate to new U.S. jurisdictions, sometimes on short notice. Such moves may be for personal reasons, including the need to find employment or to better serve a client. The admissions process in the new jurisdiction, however, can take considerable time. In February 2012, the ABA House of Delegates recognized that lawyer spouses of military personnel frequently encounter this issue and adopted a policy designed to help those lawyers relocate to new jurisdictions.

The Commission's proposed new Model Rule on Practice Pending Admission builds on the House of Delegates' recent decision. With layers of client and public protections, the new Model Rule would enable a lawyer who has been engaged in the active practice of law for 3 of the last 5 years to practice from an office in a new jurisdiction while that lawyer diligently pursues admission there through an authorized procedure, such as admission by motion or passage of that jurisdiction's bar examination. The new Model Rule would give clients their choice of counsel and permit lawyers to practice for a limited period of time without the risk of engaging in the unauthorized practice of law.

- In another proposal recognizing the reality of an increasingly mobile profession, the Commission recommends reducing the "time in practice" requirement in the ABA Model Rule on Admission by Motion from 5 of 7 years to 3 of 5 years. The Commission believes this change responds to client needs and market demands in an increasingly borderless world, where lawyers frequently need to gain admission in other U.S. jurisdictions.

The Commission determined that a reduction of the active practice requirement to 3 of 5 years would have particularly salutary effects for less senior lawyers, who are most likely to need to move from one jurisdiction to another.

A number of jurisdictions have not yet adopted an admission by motion process or have processes with extensive restrictions and requirements. Thus, the Commission is also proposing a resolution that encourages the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions with admission by motion procedures to eliminate restrictions, such as reciprocity requirements, that do not appear in the Model Rule.

- When a lawyer explores the possibility of joining a different firm or organization or when firms consider a merger, lawyers must identify possible conflicts of interest. The Model Rules, however, do not provide sufficient guidance as to how to do so in a manner consistent with a lawyer's duty of confidentiality. Consequently, firms have developed practices that vary widely. The Commission's proposed amendments to Model Rule 1.6 (Confidentiality of Information) – consistent with ABA Formal Opinion 09-455 and other state ethics opinions – will give lawyers limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. The amendments make clear, however, that even these limited disclosures are not permissible if they would "compromise the attorney-client privilege or otherwise

prejudice the client.” The Commission is also proposing a change to Comment [7] to Rule 1.17 (Sale of Law Practice) because that Comment addresses conceptually similar issues.

These proposals serve two important goals. First, reflecting the reality that these disclosures are already taking place, the proposals seek to ensure that the disclosures are properly regulated and provide more, rather than less, protection for client confidences. Second, the proposals offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

### *Outsourcing*

As noted above, lawyers are increasingly outsourcing legal and law-related work, both domestically and offshore. In 2008, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that provides guidance to lawyers about how to outsource ethically and in a manner that is consistent with the profession’s core values.<sup>35</sup> State and local bar associations also have offered guidance in this area.<sup>36</sup> To date, however, the Model Rules and their accompanying Comments have not incorporated this guidance.

The Commission concluded that, although changes to the text of the Model Rules are not necessary, the Comments to some of those Rules should be clarified to help lawyers better understand how ethically to retain outside lawyers and nonlawyers to perform legal and law-related work for a client.

- Proposed new Comments to Model Rule 1.1 (Competence) identify the factors that lawyers need to consider when retaining lawyers outside the firm to assist on a matter, including that they will contribute to the competent and ethical representation of the client. The Comment also provides that, ordinarily, a lawyer should obtain a client’s informed consent before retaining nonfirm lawyers to assist on a client’s matter.
- The Commission is also proposing amendments to both the title of Model Rule 5.3 (changing it from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance”) and its Comments to underscore that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer’s own professional obligations, including the lawyer’s obligation to protect client information. The changes also alert lawyers that they have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers.

<sup>35</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008).

<sup>36</sup> See, e.g., State Bar of Cal., Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2004-165 (2004); Colo. Bar Ass’n, Formal Op. 121 (2009); Fla. State Bar Prof’l Ethics Comm., Formal Op. 07-2 (2008); N.C. State Bar, 2007 Formal Op. 12 (2008); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 762 (2003); N.Y.C. Bar Ass’n Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006); Ohio Sup. Ct. Bd. of Comm’rs on Grievances & Discipline, Advisory Op. 2009-06 (2009); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Responsibility, *Report on the Outsourcing of Legal Services Overseas* (2009); Council of Bars and Law Societies of Europe, *CCBE Guidelines on Legal Outsourcing* (2010), [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_Guidelines\\_on\\_leg1\\_1277906265.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf).

- Finally, proposed amendments to Comment [1] of Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice) would make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

## Conclusion

The Commission's objective has been to develop recommendations that respond to a rapidly changing legal marketplace while preserving the legal profession's core values. We pursued this goal through a highly collaborative and deliberative process that was commensurate with the seriousness of our task and that will continue as we consider our remaining proposals.

In this process, we have had the honor of serving with an extraordinarily dedicated and talented group of people who have devoted substantial time, energy, and attention to the Commission's work. We came to this work from various backgrounds, including small firms, large firms, government work, in-house counsel positions, the judiciary, and academia, and with different perspectives on the practice of law and the challenges that lawyers face. We engaged in vigorous debate and research. Despite a diversity of perspectives and views, we reached, through a collaborative process, a consensus as to how to approach all of the issues set forth in these Resolutions and accompanying Reports.

We benefited from the invaluable input of members of the bar and the public who responded to our requests for feedback and testified at our hearings and other venues. This highly participatory process was necessary to inform the work of the Commission in assessing and responding to the changes wrought by technology and globalization, while preserving necessary public protections and providing lawyers with greater clarity regarding their ethical obligations in a 21<sup>st</sup> century legal marketplace.

On behalf of the Commission, we thank ABA Past President Carolyn B. Lamm for her foresight in establishing the Commission and her commitment to ensuring that the Association retains its leadership role in developing and promoting the highest standards of professional conduct to protect clients and guide lawyers; ABA Past President Stephen N. Zack, current ABA President Wm. T. (Bill) Robinson, III, and ABA President-Elect Laurel G. Bellows for their support of the Commission's work throughout its tenure; our Reporters, Andrew M. Perlman (Chief Reporter), Paul D. Paton, Anthony Sebok, and W. Bradley Wendel for their diligence and insights in researching and drafting the many reports, resolutions, papers, and other documents that the Commission produced; Commission Counsel Ellyn S. Rosen for her leadership and good counsel with respect to every facet of the Commission's efforts; Jeanne P. Gray, Associate Executive Director and Director of the ABA Center for Professional Responsibility for her support; and to the many Center lawyers and ABA Staff who assisted us.

It is important to note that the proposals set forth in these Resolutions reflect the state of the profession during a snapshot in time. Technology and globalization will continue to produce new challenges and opportunities. Indeed, the pace of change has quickened, making it likely that the ABA will want to reexamine the Model Rules and related policies with greater frequency in the years ahead.

In the meantime, it is our hope that our efforts will advance the profession's core values, give lawyers more guidance regarding their ethical obligations, and most importantly, benefit the clients and the public that we are privileged to serve.

Respectfully submitted,

**ABA Commission on Ethics 20/20  
August 2012**

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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 11-459

August 4, 2011

## Duty to Protect the Confidentiality of E-mail Communications with One's Client

*A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.<sup>1</sup>*

### Introduction

Lawyers and clients often communicate with each other via e-mail and sometimes communicate via other electronic means such as text messaging. The confidentiality of these communications may be jeopardized in certain circumstances. For example, when the client uses an employer's computer, smartphone or other telecommunications device, or an employer's e-mail account to send or receive e-mails with counsel, the employer may obtain access to the e-mails. Employers often have policies reserving a right of access to employees' e-mail correspondence via the employer's e-mail account, computers or other devices, such as smartphones and tablet devices, from which their employees correspond. Pursuant to internal policy, the employer may be able to obtain an employee's communications from the employer's e-mail server if the employee uses a business e-mail address, or from a workplace computer or other employer-owned telecommunications device on which the e-mail is stored even if the employee has used a separate, personal e-mail account. Employers may take advantage of that opportunity in various contexts, such as when the client is engaged in an employment dispute or when the employer is monitoring employee e-mails as part of its compliance responsibilities or conducting an internal investigation relating to the client's work.<sup>2</sup> Moreover, other third parties may be able to obtain access to an employee's electronic communications by issuing a subpoena to the employer. Unlike conversations and written communications, e-mail communications may be permanently available once they are created.

The confidentiality of electronic communications between a lawyer and client may be jeopardized in other settings as well. Third parties may have access to attorney-client e-mails when the client receives or sends e-mails via a public computer, such as a library or hotel computer, or via a borrowed computer. Third parties also may be able to access confidential communications when the client uses a computer or other device available to others, such as when a client in a matrimonial dispute uses a home computer to which other family members have access.

In contexts such as these, clients may be unaware of the possibility that a third party may gain access to their personal correspondence and may fail to take necessary precautions. Therefore, the risk that third parties may obtain access to a lawyer's e-mail communications with a client raises the question of what, if any, steps a lawyer must take to prevent such access by third parties from occurring. This opinion addresses this question in the following hypothetical situation.

An employee has a computer assigned for her exclusive use in the course of her employment. The company's written internal policy provides that the company has a right of access to all employees' computers and e-mail files, including those relating to employees' personal matters. Notwithstanding this

<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> Companies conducting internal investigations often secure and examine the e-mail communications and computer files of employees who are thought to have relevant information.

policy, employees sometimes make personal use of their computers, including for the purpose of sending personal e-mail messages from their personal or office e-mail accounts. Recently, the employee retained a lawyer to give advice about a potential claim against her employer. When the lawyer knows or reasonably should know that the employee may use a workplace device or system to communicate with the lawyer, does the lawyer have an ethical duty to warn the employee about the risks this practice entails?

#### Discussion

Absent an applicable exception, Rule 1.6(a) requires a lawyer to refrain from revealing "information relating to the representation of a client unless the client gives informed consent." Further, a lawyer must act competently to protect the confidentiality of clients' information. This duty, which is implicit in the obligation of Rule 1.1 to "provide competent representation to a client," is recognized in two Comments to Rule 1.6. Comment [16] observes that a lawyer must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment [17] states in part: "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.... Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."

This Committee has recognized that these provisions of the Model Rules require lawyers to take reasonable care to protect the confidentiality of client information,<sup>3</sup> including information contained in e-mail communications made in the course of a representation. In ABA Op. 99-413 (1999) ("Protecting the Confidentiality of Unencrypted E-Mail"), the Committee concluded that, in general, a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating Model Rule 1.6(a) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The opinion, nevertheless, cautioned lawyers to consult with their clients and follow their clients' instructions as to the mode of transmitting highly sensitive information relating to the clients' representation. It found that particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters.

Clients may not be afforded a "reasonable expectation of privacy" when they use an employer's computer to send e-mails to their lawyers or receive e-mails from their lawyers. Judicial decisions illustrate the risk that the employer will read these e-mail communications and seek to use them to the employee's disadvantage. Under varying facts, courts have reached different conclusions about whether an employee's client-lawyer communications located on a workplace computer or system are privileged, and the law appears to be evolving.<sup>4</sup> This Committee's mission does not extend to interpreting the substantive law, and

<sup>3</sup> See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008) (Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services) ("the obligation to 'act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision'" requires a lawyer outsourcing legal work "to recognize and minimize the risk that any outside service provider may inadvertently -- or perhaps even advertently -- reveal client confidential information to adverse parties or to others who are not entitled to access ... [and to] verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters.").

<sup>4</sup> See, e.g., *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 663 (N.J. 2010) (privilege applied to e-mails with counsel using "a personal, password protected e-mail account" that were accessed on a company computer); *Sims v. Lakeside Sch.*, No. C06-1412RSM, 2007 WL 2745367, at \*2 (W.D. Wash. Sept. 20, 2007) (privilege applied to web-based e-mails to and from employee's counsel on hard drive of computer furnished by employer); *National Econ. Research Assocs. v. Evans*, No. 04-2618-BLS2, 21 Mass.L.Rptr. 337, 2006 WL 2440008, at \*5 (Mass. Super. Aug. 3, 2006) (privilege applied to "attorney-client communications unintentionally stored in a temporary file on a company-owned computer that were made via a private, password-protected e-mail account accessed through the Internet, not the company's Intranet"); *Holmes v. Petrovich Development Co.*, 191 Cal.App.4<sup>th</sup> 1047, 1068-72 (2011) (privilege

therefore we express no view on whether, and in what circumstances, an employee's communications with counsel from the employee's workplace device or system are protected by the attorney-client privilege. Nevertheless, we consider the ethical implications posed by the risks that these communications will be reviewed by others and held admissible in legal proceedings.<sup>5</sup> Given these risks, a lawyer should ordinarily advise the employee-client about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, just as a lawyer should avoid speaking face-to-face with a client about sensitive matters if the conversation might be overheard and should warn the client against discussing their communications with others. In particular, as soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications.

The time at which a lawyer has an ethical obligation under Rules 1.1 and 1.6 to provide advice of this nature will depend on the circumstances. At the very least, in the context of representing an employee, this ethical obligation arises when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means,<sup>6</sup> using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party. Considerations tending to establish an ethical duty to protect client-lawyer confidentiality by warning the client against using a business device or system for substantive e-mail communications with counsel include, but are not limited to, the following: (1) that the client has engaged in, or has indicated an intent to engage in, e-mail communications with counsel; (2) that the client is employed in a position that would provide access to a workplace device or system; (3) that, given the circumstances, the employer or a third party has the ability to access the e-mail communications; and (4) that, as far as the lawyer knows, the employer's internal policy and the jurisdiction's laws do not clearly protect the privacy of the employee's personal e-mail communications via a business device or system. Unless a lawyer has reason to believe otherwise, a lawyer ordinarily should assume that an employer's internal policy allows for access to the employee's e-mails sent to or from a workplace device or system.

The situation in the above hypothetical is a clear example of where failing to warn the client about the risks of e-mailing communications on the employer's device can harm the client, because the employment dispute would give the employer a significant incentive to access the employee's workplace e-mail and the employer's internal policy would provide a justification for doing so. The obligation arises once the lawyer has reason to believe that there is a significant risk that the client will conduct e-mail communications with the lawyer using a workplace computer or other business device or via the employer's e-mail account. This possibility ordinarily would be known, or reasonably should be known, at the outset of the representation. Given the nature of the representation—an employment dispute—the lawyer is on notice that the employer may search the client's electronic correspondence. Therefore, the lawyer must ascertain, unless the answer is already obvious, whether there is a significant risk that the client will use a business e-mail address for personal communications or whether the employee's position entails using an employer's device. Protective measures would include the lawyer refraining from sending e-mails

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inapplicable to communications with counsel using workplace computer); *Scott v. Beth Israel Medical Center, Inc.*, 847 N.Y.S.2d 436, 440-43 (N.Y. Sup. Ct. 2007) (privilege inapplicable to employer's communications with counsel via employer's e-mail system); *Long v. Marubeni Am. Corp.*, No. 05CIV.639(GEL)(KNF), 2006 WL 2998671, at \*3-4 (S.D.N.Y. Oct. 19, 2006) (e-mails created or stored in company computers were not privileged, notwithstanding use of private password-protected e-mail accounts); *Kaufman v. SunGard Inv. Sys.*, No. 05-CV-1236 (JLL), 2006 WL 1307882, at \*4 (D.N.J. May 10, 2006) (privilege inapplicable to communications with counsel using employer's network).

<sup>5</sup> For a discussion of a lawyer's duty when receiving a third party's e-mail communications with counsel, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011) (Duty when Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel).

<sup>6</sup> This opinion principally addresses e-mail communications, which are the most common way in which lawyers communicate electronically with clients, but it is equally applicable to other means of electronic communications.

to the client's workplace, as distinct from personal, e-mail address,<sup>7</sup> and cautioning the client against using a business e-mail account or using a personal e-mail account on a workplace computer or device at least for substantive e-mails with counsel.

As noted at the outset, the employment scenario is not the only one in which attorney-client electronic communications may be accessed by third parties. A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access. The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

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<sup>7</sup> Of course, if the lawyer becomes aware that a client is receiving personal e-mail on a workplace computer or other device owned or controlled by the employer, then a duty arises to caution the client not to do so, and if that caution is not heeded, to cease sending messages even to personal e-mail addresses.

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