

## Model Rules of Professional Conduct In the Post-Enron Era

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### INTRODUCTION

The Enron scandal and the slew of corporate meltdowns that followed in its wake launched a tsunami of regulatory reform to restore public trust in corporate decision-making. Squarely in the cross-hairs of these reform efforts was the traditional role of the lawyer as confidential advisor and zealous advocate. This article will trace the recent evolution of the American Bar Association (“ABA”) Model Rules of Professional Conduct in response to these concerns, focusing on those revisions most relevant to school board attorneys and others representing organizational clients.<sup>1</sup>

In 1997, the ABA Commission on the Evaluation of the Rules of Professional Conduct (the “Ethics 2000” Commission) was established to undertake a comprehensive study to update and modernize the ABA Model Rules of Professional Conduct, first adopted in 1983. The Commission’s final report, submitted to the ABA House of Delegates in August 2001, recommended many changes to the Model Rules, nearly all of which were adopted by the ABA House of Delegates in February 2002.

In March 2002, the ABA Presidential Task Force on Corporate Responsibility was formed to address “systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations.” Later that year, Congress passed the Sarbanes-Oxley Act of 2002, imposing additional obligations on counsel for publicly-traded corporations, and the Securities and Exchange Commission (“SEC”) adopted implementing regulations governing attorneys deemed to be practicing before that agency.

Following these developments, state courts across the country have reviewed the amendments to the Model Rules, either as part of their ongoing rule-revision process or through separate commissions established for that purpose, and have adopted many of them in one form or another. The full text of the current Model Rules and commentary is available at the ABA’s website at <http://www.abanet.org/cpr/mrpc>. However, the ABA Model Rule amendments are not binding unless adopted by the jurisdiction in which the attorney is practicing. A state-by-state status report as of January 6, 2006, follows this article.

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1. For a more comprehensive discussion of the issues discussed here, see Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, GEORGETOWN JOURNAL OF LEGAL ETHICS (Spring 2002); Lawrence A. Hammermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, GEORGETOWN JOURNAL OF LEGAL ETHICS (Fall 2003); Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality*, GEORGETOWN JOURNAL OF LEGAL ETHICS (Fall 2003); Larry O. Natt Gantt II, *More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, GEORGETOWN JOURNAL OF LEGAL ETHICS (Spring 2005); Jacquelin F. Drucker, Presentation at the American Bar Association, Labor and Employment Law Section, 2003 Annual Meeting: Emerging Issues in Arbitration Ethics (Aug. 11, 2003), available at <http://www.bna.com/bnabooks/ababna/annual/2003/drucker.doc>.

## “SCOPE”

Whether an ethics violation *per se* gives rise to a civil cause of action has been the subject of much case law since the Model Rules were first adopted in 1983. Consistent with the weight of legal authority across the country, Ethics 2000 revised the “Scope” section of the Rules to provide that a violation of the Rules may be admissible evidence of a breach of duty, but should not “itself” give rise to a cause of action against the lawyer or “necessarily” warrant disqualification or any other non-disciplinary remedies.

## RULE 1.6 AND RULE 1.13: CONFIDENTIALITY AND THE INSTITUTIONAL CLIENT

By far the most controversial changes to the Model Rules are in Rule 1.6, dealing with client confidentiality, and Rule 1.13, addressing representation of organizational clients. The history of these changes reflects the ongoing struggle among the corporate community, the bar, criminal prosecutors, and securities regulators to hammer out workable standards that promote the overall public good. No one challenged the basic premise that society is better off when individuals and corporations seek legal advice about their rights and responsibilities, and that such advice will more likely be sought when confidentiality is assured. The challenge was to fashion rules to prevent a client’s use of the attorney as an instrument of fraud, without simultaneously discouraging the client from seeking legal counsel in the first place.

The Ethics 2000 Commission originally recommended changes in Rule 1.6 to give attorneys more discretion to disclose client confidences to prevent or remediate fraud. Under the prior version of the Rule, a lawyer could disclose confidential information only if authorized by the client to do so, to defend himself against criminal or disciplinary charges, in a fee dispute, or “to prevent the client from committing a criminal act that is likely to result in imminent death or substantial bodily harm.” The Commission suggested two new provisions to subsection (b) of the Rule, permitting an attorney to reveal information “to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services,” or “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.” Corresponding changes were considered for Rule 1.13 as well, but ultimately considered unnecessary given the expansion of Rule 1.6. The House of Delegates rejected the Commission’s proposals allowing disclosure of financial crime and fraud, but the Task Force on Corporate Responsibility, which began its work shortly afterward, kept the issue alive.

When the Task Force began its work in the spring of 2002, the WorldCom, Tyco, and HealthSouth scandals had not yet erupted, and the Sarbanes-Oxley Act of 2002 had not yet been passed, but the pressure to reexamine the attorney’s role in advising institutional clients was already mounting. For example, in March 2002, a group of forty law professors wrote to the SEC, criticizing the existing version of Model Rule 1.13. They advocated for the adoption of an “up the ladder” reporting rule that would require a lawyer “who represents a corporation in connection with its securities law compliance to inform the client’s board of directors if the lawyers knows that

the client is violating the securities laws and senior management does not promptly rectify the violation."<sup>2</sup> The SEC declined to do so at the time, being of the view that regulation of lawyer conduct was traditionally the function of the states, and that any national regulation should be enacted by Congress, not through SEC rule-making.<sup>3</sup>

The Task Force was convinced early on that the House of Delegates should reconsider the rejected amendments to Rule 1.6 permitting disclosure of corporate crime and fraud. This position was arrived at well before the federal government moved in the direction of imposing such a duty on lawyers. The proposed changes to Rule 1.6 in the Task Force's preliminary report went further than Ethics 2000, not simply allowing but mandating disclosure of client information in order to prevent client conduct known to the lawyer to involve a crime, including violations of federal securities laws and regulations, in furtherance of which the client has used the lawyer's services. The mandatory disclosure proposal was severely criticized, however, on the ground that it would undermine the attorney's ability to combat fraud within the organization by discouraging corporate representatives from consulting with counsel at all. In the end, the Task Force reverted back to the discretionary language recommended by Ethics 2000.

It is significant that even this discretionary disclosure is limited to criminal or fraudulent conduct involving the use of the attorney's own services. The primacy of lawyer-client confidentiality was thereby preserved, since it is an abuse of the lawyer-client relationship when a client uses the lawyer as an instrument of wrongdoing.

The current version of Model Rule 1.6 reads:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

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2. Letter from Richard W. Painter, Professor, et al., to Harvey Pitt, Chairman, Securities and Exchange Commission (Mar. 7, 2002), available at <http://www.abanet.org/buslaw/corporateresponsibility/pitt.pdf>.

3. Letter from David Becker, General Counsel, Securities and Exchange Commission, to Richard W. Painter, Professor (Mar. 28, 2002), available at <http://www.abanet.org/buslaw/corporateresponsibility/becker.pdf>.

- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other laws or a court order.

The Task Force's deliberations on Rule 1.13 unfolded against the backdrop of the SEC's promulgation of regulations under § 307 of the Sarbanes-Oxley Act. Its preliminary report expressed concerns about how high a threshold of knowledge was appropriate to trigger a duty to report wrongdoing. The existing Rule's requirement that a lawyer "know" of wrongdoing was considered unduly restrictive, since a lawyer rarely "knows" for sure much of anything about a client's misbehavior.

The Task Force's preliminary report discarded the "knowledge" standard as the trigger for the duty to report, recommending that the duty commence when the lawyer "reasonably should know" of the misconduct. However, this standard came under considerable attack within the Task Force itself because, its opponents argued, it would impose a duty to investigate a client's behavior, in circumstances where the lawyer might be unable to insist that the client pay for or even permit it.

Similar debate surrounded the SEC's proposed Rule 205.2(e), which would have defined the triggering event as "information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur." The final SEC rule ultimately required "up the ladder" reporting only on the basis of "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." The Task Force's final report proposed an amendment to Rule 1.13 that would have triggered a reporting duty only on the basis of facts known to the lawyer, and only where "a reasonable lawyer, under the circumstances, would conclude" that the misconduct is present. However, in a compromise during the floor debate by the House of Delegates on August 12, 2003, the Task Force withdrew its trigger proposal, and consented to an amendment leaving the "knowledge" standard in place.

The Task Force also recommended a new subsection (c) to Rule 1.13, allowing disclosure of client information if the organization's highest authority insists on or fails to address a violation of law by the organization, and the lawyer reasonably believes that disclosure to a third party is necessary to prevent substantial injury to the organization. Under new subsection (d), however, this discretion does not apply when the attorney is representing an organization in connection with an investigation of an alleged violation of law, or in the defense of the organization, an officer, or some other constituent on a claim arising out of an alleged violation of law.

The Task Force also proposed subsection (e), comparable to the SEC's Part 205 Rules, requiring that a lawyer take steps to assure that an organizational client's highest authority is informed of the lawyer's withdrawal or discharge in circumstances where subsection (b) or (c) requires or permits the lawyer to report to higher authority or to third parties.

The current version of Model Rule 1.13 reads:

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) Except as provided in paragraph (d), if
  - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
  - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors,

officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

### **RULE 1.7: CONFLICT OF INTEREST**

The Commission reorganized Rule 1.7 and revised the commentary to clarify the Rule's provisions on concurrent conflicts. Paragraph (a) distinguishes between conflicts in which a lawyer may be "directly adverse" to a client and those in which his or her representation of the client may be "materially limited." Paragraph (b) provides that a lawyer may represent clients in a conflict situation with the "informed consent" of each client, except in certain situations. Client consent now must be "confirmed in writing," though the writing need not be signed by the client. The comments explain that "the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to resolve disputes or ambiguities that might later occur."

The comments define a "directly adverse" conflict under paragraph (a)(1) as one in which the lawyer takes a position on behalf of one client against another client, in the same or an unrelated matter. A conflict also may exist under paragraph (a)(2) if there is a "significant risk" that a lawyer's ability to represent the client would be "materially limited as a result of the lawyer's other responsibilities or interests." The comments explain that representation of clients whose interests are only economically adverse does not constitute a "directly adverse" conflict, but may constitute a "material limitation" conflict in certain situations. Also, a "positional conflict," where the lawyer takes inconsistent legal positions in different matters on behalf of different clients, might possibly constitute a "material limitation" conflict.

Paragraph (b) prohibits concurrent representation, even with client consent, if the lawyer does not "reasonably believe" that he or she can "provide competent and diligent representation to each affected client," or where the representation is prohibited by law. In addition, a lawyer or lawyers from the same firm may never represent clients asserting claims against each other in the same case.

The comments provide that a lawyer may request a client to consent to future conflicts, but such waivers will be effective only when the client "reasonably understands the material risks that the waiver entails."

### **RULE 1.9: CONFLICT OF INTEREST/FORMER CLIENTS**

Rule 1.9, now entitled "Duties to Former Client," retained the prohibition against taking on matters adverse to a former client in the same or "substantially related" matters, but the Commission revised the commentary. A new Comment [3] explains that matters will be deemed "substantially related" for purposes of the Rule "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in

the subsequent matter.” The commentary makes clear that this disqualification does not apply when the information is already in the public domain or has already been disclosed to adverse parties.

### **RULE 1.10: IMPUTATION AND SCREENING**

Under Rule 1.10, conflicts under Rules 1.7 and 1.9 are still imputed to all lawyers in a “firm” under Rule 1.10. The commentary to the definition of “firm” in Rule 1.0 explains that a “firm” may include unaffiliated lawyers sharing office space if inadequate measures are taken to protect confidential information. Rule 1.10(a) exempts from imputation “personal interest conflicts” that do not present a “significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” This would apply, for example, where the attorney is a relative of the adverse party.

### **RULE 1.11: CONFLICT OF INTEREST/GOVERNMENT LAWYERS**

The Commission revised Rule 1.11, now titled “Special Conflicts of Interest for Former and Current Government Officers and Employees,” to consolidate in one rule the conflict of interest standards for government lawyers. The revised Rule provides that government lawyers are subject to Rule 1.7, in all respects. As for Rule 1.9, otherwise applicable when former government lawyers oppose the agencies they previously represented, concerns were expressed during the Commission’s deliberations that applying Rule 1.9’s “substantial relationship” test would unduly inhibit the transition to and from government service and, thereby, discourage lawyers from taking such positions. To accommodate these concerns, the Commission concluded that a former government lawyer should be disqualified only where he participated “personally and substantially” in “a particular matter.” The Rule continues to define “matter” narrowly, so that a former government lawyer is barred from representing another client only in matters involving a specific party or parties, which would seem to exclude rule-making and policy-making matters.

The new Rule 1.11 affirms that former government lawyers have a general obligation of confidentiality to their former government clients under Rules 1.6 and 1.9(c). The Commission retained the existing prohibition in Rule 1.11(b) against using “confidential government information” about a person acquired during government services against that person. Government lawyers also are barred from representing or advising a government agency in a matter adverse to a former client, even if the former client consents, except with the consent of the government.

The imputation rules of Rule 1.10 remain inapplicable to government lawyers. However, Rule 1.11 prohibits a former government lawyer’s firm from taking on a matter in which the lawyer is personally disqualified, unless he or she is screened and receives no part of the fee resulting from the engagement. Rule 1.11(b) now requires that screening be implemented in a timely manner, with notice to all affected parties. The new definition of “screened” in Rule 1.0 requires the “timely” imposition of procedures to “isolate” the disqualified lawyer from participation in a matter. The comments now require that all lawyers in a firm be informed of the screening, and that they are not to communicate with the screened lawyer about the matter.

## **RULE 1.18: PROSPECTIVE CLIENTS**

The Commission developed a new Rule 1.18, "Duties to Prospective Client," to address duties of lawyers arising from communications with potential clients seeking to retain counsel. The Rule applies the prohibition of Rule 1.9 to the consulted lawyer's representation of parties adverse to the prospective client in matters substantially related to the one about which the lawyer was consulted, if the lawyer learned of information that could be "significantly harmful" to the prospective client in the matter. Other lawyers in the same firm may represent the adverse party as long as the disqualified lawyer took "reasonable measures" to limit unnecessary exposure to potentially harmful information, and is screened from any participation in the matter.

## **RULE 2.1: ATTORNEY AS ADVISOR**

The Commission retained intact the former Rule 2.1, "Advisor," but it is worth mentioning in the context of the other changes to the Model Rules addressing the lawyer's post-Enron role in advising organizational clients. The Rule provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

The comments explain: "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."

Some commentators have argued that lawyers have more than simply the discretion to counsel clients on moral issues, but a duty to do so, relying on the comments to Rule 2.1, the "communication" responsibilities of Rule 1.4, and the provisions of Rules 1.16(b)(4) and 6.2(c) permitting an attorney to withdraw from or decline representation on nonlegal grounds. The ABA Task Force on Corporate Responsibility also concluded that "The Model Rules encourage lawyers to embrace and observe moral and ethical considerations beyond legally required minimum standards." This author's view is that advice on nonlegal considerations may be appropriate when necessary to advance the client's agenda, for example, when a school board is overlooking an obvious nonlegal consideration that the attorney knows from past experience is important to that client. It is inappropriate, however, for the attorney to use the power of his or her office to advance the attorney's personal agenda.

## **RULE 2.4: THIRD PARTY NEUTRALS**

A new Rule 2.4, "Lawyer Serving as Third-Party Neutral," focuses on the role of attorneys serving as mediators and arbitrators in alternate dispute resolution:

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may



include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Based on opposition from the ADR community, the Commission did not attempt a comprehensive definition of the obligations of lawyers serving as third-party neutrals through lawyer-ethics rules. For example, the Commission considered and rejected provisions that would have prohibited a neutral from giving legal advice to the parties and one that would have prohibited a neutral from assisting the parties in drafting a settlement document.

The Commission also amended Rule 1.12, now titled "Former Judge, Arbitrator, Mediator or Other Third-Party Neutral," to bar former mediators from representing clients in any matter in which they participated personally and substantially while a mediator, although others in their firm may do so if the former mediator is screened. Revisions to that Rule have also eliminated arbitrators' law clerks from the restrictions on subsequent representation or negotiation from employment. The restriction now applies only to law clerks who work for judges and adjudicative officers.

The Commission initially proposed to extend a broader conflict of interest rule to all third-party neutrals, and disallow screening for lawyers associated with them. It later decided against this based on concerns that this would discourage arbitration and mediation practice by lawyers in firms, including participation in voluntary court-sponsored ADR programs.

### **RULE 3.3: CANDOR TO THE TRIBUNAL**

The Commission deleted the materiality requirement that previously qualified a lawyer's obligation under Rule 3.3(a)(1) regarding not making a false or misleading statement of fact or law to a tribunal. The Commission also added a sentence to subsection (a)(1) requiring a lawyer to correct a false statement of "material" fact or law previously made to the tribunal, bringing that portion of the Rule in line with the duty in subparagraph (a)(3) to take reasonable remedial measures if the lawyer comes to know that he or she has previously offered materially false evidence.

Subparagraph (a)(3) also now provides that when the lawyer knows that evidence is false, he or she is prohibited from offering it. Where the lawyer later learns that "material" evidence offered by a client or a witness is false or misleading, he or she must take remedial steps, "including, if necessary, disclosure to the tribunal." This duty applies, "even if compliance requires disclosure of information otherwise protected by Rule 1.6." The duty does not depend on whether the client or other witness knows or otherwise appreciates that the evidence is false.

The comments now provide that a lawyer does not violate the Rule if he or she knowingly elicits false testimony for the purpose of subsequently establishing its falsity – a common technique on cross-examination. Also, where the lawyer "reasonably believes" evidence to be false,

but does not “know” it to be so, he or she has discretion whether or not to offer it. The comments suggest that the client should be given the benefit of the doubt, although the lawyer “cannot ignore an obvious falsehood.” In such circumstances, the comments now encourage the attorney to pursue remedial measures such as discussing with the client the lawyer’s duty of candor to the tribunal, and possible withdrawal from representation. The comments also make clear that the lawyer’s obligation of candor applies “in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition.”

Practitioners are cautioned that while Rule 3.3 imposes no affirmative duty to disclose material facts to the tribunal, some states’ versions of the Rule do. New Jersey, for example, includes a subsection providing that a lawyer “shall not knowingly fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure.”<sup>4</sup> No one would seriously argue that the attorney’s role as advocate would permit a misstatement of fact, but the failure to disclose relevant information presents much more troublesome questions in our adversarial system, where counsel normally is not expected to do his or her adversary’s job. The line between permissible advocacy and unethical conduct in this area varies from state to state, and counsel are encouraged to consult their local rules.

## **RULE 4.2: COMMUNICATIONS WITH REPRESENTED PERSONS**

The Commission considered amendments to Rule 4.2, “Communication with Person Represented by Counsel,” to accommodate concerns raised by the U.S. Department of Justice. However, the Commission ultimately determined to make only one amendment to the Rule, allowing otherwise prohibited communications with represented parties when authorized by court order.

The Commission revised the comments to provide that communications “authorized by law” may include those made by a lawyer “on behalf of a client who is exercising a constitutional or other legal right to communicate with the government,” as well as those made during “investigative activities of lawyers representing governmental entities, directly or indirectly through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.” However, the comment includes a caveat that “[t]he fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.”

The new comments make clear that a lawyer may advise a represented person who is seeking a second opinion, as long as the lawyer does not otherwise represent a client in the matter. The new comments also confirm that a lawyer may not circumvent the Rule by acting through others, although the parties to a matter themselves may communicate directly. The comments also now provide that communications with “a constituent” of an organization include anyone who “supervises, directs, or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in the matter may be imputed to the organization for purposes of civil or criminal liability.”

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4. See *In the Matter of Seelig*, 850 A.2d 477 (N.J. 2004) (construing New Jersey Rule of Professional Conduct 3.3(a)(5)).

The Commission added new language stating that the consent of the organization's lawyer is not required to contact former constituents of the organization, with a warning that a lawyer communicating with former constituents should not solicit or assist in the breach of any duty of confidentiality owed to the organization.

#### **RULE 4.4: INADVERTENT DISCLOSURES**

The Commission added a new subsection (b) to Rule 4.4, "Respect for Rights of Third Persons," addressing a lawyer's duty when documents are inadvertently disclosed to adversaries or others. The new language states that a lawyer who receives a document relating to the representation of the lawyer's client, and knows or reasonably should know that it was inadvertently sent, must promptly notify the sender. The Commission declined to adopt a more detailed recitation of the lawyer's obligation (e.g., returning the document, not reading it), leaving that issue to be resolved as a matter of substantive law.

#### **RULE 5.1/5.3: LAW OFFICE MANAGEMENT**

Rule 5.1(a), "Responsibilities of a Partner or Supervisory Lawyer," and Rule 5.3(a), "Responsibilities Regarding Nonlawyer Assistants," were revised to clarify that the duty to ensure compliance by other lawyers and nonlawyer assistants applies not just to "partners," but to all lawyers with "managerial authority." The Commission also rejected a proposal to delete paragraph (b) of Rule 5.2, "Responsibilities of a Subordinate Lawyer," immunizing a subordinate lawyer if he or she acts in accordance with a supervisory lawyer's "reasonable resolution of an arguable question of professional duty," for fear that junior lawyers could avoid discipline by arguing they were simply following orders.

#### **CONCLUSION**

The public's negative perception of lawyers, once relegated to lawyer jokes at cocktail parties, became serious business once thousands of innocent people lost their life savings in the corporate scandals mentioned above. Whether the attorneys on whose watch these misdeeds occurred were enablers of wrongdoing, or were duped themselves, no longer matters. Even though the Sarbanes-Oxley Act and its regulations apply only to a small slice of the practicing bar, their spirit has infused the work of bar regulators across the country and heightened public expectations. Lawyers who have not kept pace with recent rule changes will find many surprises, hopefully in time to avoid an unwitting violation.

**STATUS OF STATE REVIEW OF PROFESSIONAL CONDUCT RULES  
(1/6/06)**

<b>State</b>	<b>Committee Reviewing Rules</b>	<b>Committee Issued Report</b>	<b>Supreme Court Approved Rule Amendments</b>	<b>Notes</b>
<b>Alabama</b>				No current review.
<b>Alaska</b>		X		Bar Association Rules of Professional Conduct Committee has made recommendations to Board of Governors.
<b>Arizona</b>			X	Revised rules effective 12/1/03 <a href="http://www.supreme.state.az.us/media/pdf/test%20ule%2042%20%2043.pdf">http://www.supreme.state.az.us/media/pdf/test%20ule%2042%20%2043.pdf</a>
<b>Arkansas</b>			X	Revised rules effective 5/1/05 <a href="http://courts.state.ar.us/opinions/2005a/20050303/arp c2005.html">http://courts.state.ar.us/opinions/2005a/20050303/arp c2005.html</a>
<b>California</b>		X		State Bar Commission for the Revision of the Rules of Professional Conduct has issued drafts for comment. <a href="http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Draft_Rules.gif&amp;sCategoryPath=/Home/Attorney%20Resources/Ethics%20Information/Commission%20for%20the%20Revision%20of%20the%20Rules%20of%20Professional%20Conduct&amp;sHeading=Draft%20Rules&amp;sFileType=HTML&amp;sCategoryPath=html/CRRPC_Draft-Rules.html">http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Draft_Rules.gif&amp;sCategoryPath=/Home/Attorney%20Resources/Ethics%20Information/Commission%20for%20the%20Revision%20of%20the%20Rules%20of%20Professional%20Conduct&amp;sHeading=Draft%20Rules&amp;sFileType=HTML&amp;sCategoryPath=html/CRRPC_Draft-Rules.html</a>
<b>Colorado</b>		X		Supreme Court Committee on Rules of Professional Conduct reviewing report. <a href="http://www.courts.state.co.us/supct/committees/profconductcomm.htm">http://www.courts.state.co.us/supct/committees/profconductcomm.htm</a>
<b>Connecticut</b>		X		Judges' Committee for Rulemaking reviewing report.
<b>Delaware</b>			X	Revised rules effective 7/1/03 <a href="http://courts.state.de.us/Rules/?FinalDLRPCclean.pdf">http://courts.state.de.us/Rules/?FinalDLRPCclean.pdf</a>

<b>D.C.</b>		X		Bar has submitted proposed rule changes to Court of Appeals. <a href="http://www.dcbar.org/inside_the_bar/structure/report_s/rules_of_professional_conduct_review_committee/r_pcreport.cfm">http://www.dcbar.org/inside_the_bar/structure/report_s/rules_of_professional_conduct_review_committee/r_pcreport.cfm</a>
<b>Florida</b>		X		Bar has approved revised rules and submitted them to Supreme Court. <a href="http://www.flabar.org/tfb/TFBComm.nsf/840090c16eedaf0085256b61000928dc/076132cfc389d63d85256eb7004e6c15?OpenDocument">http://www.flabar.org/tfb/TFBComm.nsf/840090c16eedaf0085256b61000928dc/076132cfc389d63d85256eb7004e6c15?OpenDocument</a>  Amendments to several rules, including those regarding advertising, fees and sex with clients, were made independently of rules review committee. The current rules can be found at: <a href="http://www.floridabar.org/divexe/rrtfb.nsf/FV?Openview&amp;Start=1&amp;Expand=4.9#4.9">http://www.floridabar.org/divexe/rrtfb.nsf/FV?Openview&amp;Start=1&amp;Expand=4.9#4.9</a>  Amendments to several rules, including a new rule regulating client contact when lawyers leave or dissolve firms, were adopted in October 2005. <a href="http://www.floridasupremecourt.org/decisions/2005/sc05-206.pdf">http://www.floridasupremecourt.org/decisions/2005/sc05-206.pdf</a>
<b>Georgia</b>	X			Committee conducting review.
<b>Hawaii</b>	X			Disciplinary Board of Supreme Court Ethics 2000 Committee conducting review.
<b>Idaho</b>			X	Revised rules effective 7/1/04. <a href="http://www.isc.idaho.gov/irpc0304_cov.htm">http://www.isc.idaho.gov/irpc0304_cov.htm</a>

<b>Illinois</b>		X		<p>Illinois State Bar Assembly and Chicago Bar Association Board of Governors approved Joint CBA/ISBA report.  Report: <a href="http://www.isba.org/eth2000.html">http://www.isba.org/eth2000.html</a>  Article about ISBA Assembly approval (scroll down for third article):  <a href="http://www.isba.org/Association/047a.htm#gen18">http://www.isba.org/Association/047a.htm#gen18</a>  Illinois Supreme Court approved adoption of Rule 1.17 and changes to Rules 5.4, 5.6 and 7.2 effective 5/23/05.  <a href="http://www.iardc.org/rulesprofconduct.html">http://www.iardc.org/rulesprofconduct.html</a></p>
<b>Indiana</b>			X	<p>Revised rules effective 1/1/05.  <a href="http://www.in.gov/judiciary/orders/rule-amendments/2004/0904-prof-conduct.pdf">http://www.in.gov/judiciary/orders/rule-amendments/2004/0904-prof-conduct.pdf</a></p>
<b>Iowa</b>			X	<p>Revised rules effective 7/1/05.  <a href="http://www.judicial.state.ia.us/rules/amendments/">http://www.judicial.state.ia.us/rules/amendments/</a></p>
<b>Kansas</b>		X		<p>State Bar Board of Governors submitted proposed rules to Supreme Court.  <a href="http://www.ksbar.org/ethics2000.html">http://www.ksbar.org/ethics2000.html</a></p>
<b>Kentucky</b>	X			<p>State Bar Ethics Committee conducting review.</p>
<b>Louisiana</b>			X	<p>Revised rules effective 3/1/04.  <a href="http://www.lsba.org/Rpc2004.pdf">http://www.lsba.org/Rpc2004.pdf</a></p> <p>Rules 1.4, 1.5 and 1.8 were amended effective 4/1/06 to change the regulations regarding financial assistance to clients.  <a href="http://www.lasc.org/press_room/press_releases/2006/2006-01.asp">http://www.lasc.org/press_room/press_releases/2006/2006-01.asp</a></p>
<b>Maine</b>		X		<p>Supreme Court Task Force circulating proposed rules.  <a href="http://www.mebaroverseers.org/ethicsweb/ethicsmain.html">http://www.mebaroverseers.org/ethicsweb/ethicsmain.html</a></p>

<b>Maryland</b>			X	Revised rules effective 7/1/05. <a href="http://www.courts.state.md.us/rules/ruleschanges.html#153ro_select">http://www.courts.state.md.us/rules/ruleschanges.html#153ro_select</a>
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<b>Massachusetts</b>	X			Supreme Court Standing Committee on Rules of Professional Conduct conducting review.  Adopted Model Rules 2.4 and 6.5. <a href="http://www.mass.gov/obcbbo/rules.htm">http://www.mass.gov/obcbbo/rules.htm</a>
<b>Michigan</b>		X		Supreme Court is circulating proposed rules for public comment. <a href="http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-62.pdf">http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-62.pdf</a>
<b>Minnesota</b>			X	Revised rules effective 10/1/05. <a href="http://www.courts.state.mn.us/news/posting.aspx?ID=20309&amp;pageID=131">http://www.courts.state.mn.us/news/posting.aspx?ID=20309&amp;pageID=131</a>
<b>Mississippi</b>			X	Supreme Court approved changes to Rules 7.1, 7.2 and 8.5, effective 9/1/03. <a href="http://www.mssc.state.ms.us/news/sn104819.pdf">http://www.mssc.state.ms.us/news/sn104819.pdf</a>  Revised rules effective 11/3/05. <a href="http://www.mssc.state.ms.us/news/sn127394.pdf">http://www.mssc.state.ms.us/news/sn127394.pdf</a>
<b>Missouri</b>		X		Bar has submitted proposal to Supreme Court.  New advertising rules adopted, effective 1/1/06. <a href="http://www.courts.mo.gov/sup/index.nsf/d45a7635d4bfdb8f8625662000632638/49c8664ddcac74d78625708200534d23?OpenDocument">http://www.courts.mo.gov/sup/index.nsf/d45a7635d4bfdb8f8625662000632638/49c8664ddcac74d78625708200534d23?OpenDocument</a>
<b>Montana</b>			X	Revised rules effective 4/1/04 <a href="http://www.lawlibrary.state.mt.us/dscgi/ds.py/Get/File-27482/Rules.pdf">http://www.lawlibrary.state.mt.us/dscgi/ds.py/Get/File-27482/Rules.pdf</a>
<b>Nebraska</b>			X	Revised rules effective 9/1/05. <a href="http://court.nol.org/rules/">http://court.nol.org/rules/</a>
<b>Nevada</b>		X		State Bar has filed recommendations with Supreme Court. <a href="http://www.nvbar.org/Ethics/e2k.htm">http://www.nvbar.org/Ethics/e2k.htm</a>



<b>New Hampshire</b>		X		Bar Association Ethics Committee has drafted some rules for public comment. <a href="http://nhbar.org/publications/ethics/default.asp">http://nhbar.org/publications/ethics/default.asp</a>
<b>New Jersey</b>			X	Revised rules effective 1/1/04 <a href="http://www.judiciary.state.nj.us/rules/apprpc.htm">http://www.judiciary.state.nj.us/rules/apprpc.htm</a>
<b>New Mexico</b>	X			Supreme Court Code of Professional Conduct Committee conducting review.
<b>New York</b>		X		State Bar Association Committee on Standards of Attorney Conduct has sent draft to House of Delegates. <a href="http://www.nysba.org/Content/ContentGroups/COSAC_Report/COSAC_Proposed_Rules_of_Professional_Conduct.htm">http://www.nysba.org/Content/ContentGroups/COSAC_Report/COSAC_Proposed_Rules_of_Professional_Conduct.htm</a>
<b>North Carolina</b>			X	Revised rules effective 3/1/03 <a href="http://www.ncbar.com/home/proposed_rules.asp">http://www.ncbar.com/home/proposed_rules.asp</a>
<b>North Dakota</b>		X		Supreme Court and State Bar Association Joint Committee on Attorney Standards submitted report to Supreme Court. <a href="http://www.ndcourts.com/court/notices/20050353/contents.htm">http://www.ndcourts.com/court/notices/20050353/contents.htm</a>
<b>Ohio</b>		X		Supreme Court Task Force circulating draft rules for public comment. <a href="http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/default.asp">http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/default.asp</a>
<b>Oklahoma</b>		X		Ethics 2000 Subcommittee of Rules of Professional Conduct Committee circulating report for comment. <a href="http://www.okbar.org/ethics/ORPC.htm">http://www.okbar.org/ethics/ORPC.htm</a>
<b>Oregon</b>			X	Revised rules effective 1/1/05. <a href="http://www.osbar.org/barnews/hodsubmit.html">http://www.osbar.org/barnews/hodsubmit.html</a>
<b>Pennsylvania</b>			X	Revised rules effective 1/1/05. <a href="http://www.padisciplinaryboard.org/documents/Pa%20RPC.pdf">http://www.padisciplinaryboard.org/documents/Pa%20RPC.pdf</a>
<b>Rhode Island</b>	X			Supreme Court Committee conducting review.

<b>South Carolina</b>			X	Revised rules effective 10/1/05. <a href="http://www.judicial.state.sc.us/courtReg/newrules/NewRules.cfm">http://www.judicial.state.sc.us/courtReg/newrules/NewRules.cfm</a>
<b>South Dakota</b>			X	Revised rules effective 1/1/04. <a href="http://www.sdbar.org/members/Default.htm">http://www.sdbar.org/members/Default.htm</a>
<b>Tennessee</b>	X			State Bar Ethics Committee reviewing Ethics 2000 amendments. Tennessee switched to Model Rules format effective 3/1/03. <a href="http://www.tba.org/ethics2002.html">http://www.tba.org/ethics2002.html</a>
<b>Texas</b>	X			Supreme Court Task Force conducting review.  Referral fee and advertising rules revised effective 6/1/05. <a href="http://www.texasbar.com/Template.cfm?Section=Advertising_Review">http://www.texasbar.com/Template.cfm?Section=Advertising_Review</a>
<b>Utah</b>			X	Revised rules effective 11/1/05. <a href="http://www.utcourts.gov/resources/rules/approved/">http://www.utcourts.gov/resources/rules/approved/</a>
<b>Vermont</b>		X		Supreme Court circulating proposal for public comment. <a href="http://www.vermontjudiciary.org/Library/PDF/resources/VRPC-030205.pdf">http://www.vermontjudiciary.org/Library/PDF/resources/VRPC-030205.pdf</a>
<b>Virginia</b>			X	Revised rules effective 1/1/04 <a href="http://www.vsb.org/profguides/rules.pdf">http://www.vsb.org/profguides/rules.pdf</a>
<b>Washington</b>		X		Supreme Court circulating proposal for public comment. <a href="http://www.wsba.org/lawyers/groups/ethics2003/default.htm">http://www.wsba.org/lawyers/groups/ethics2003/default.htm</a>
<b>West Virginia</b>	X			State Bar Committee conducting review.
<b>Wisconsin</b>		X		State Supreme Court Ethics 2000 Committee has issued proposed amendments. <a href="http://www.wisbar.org/AM/Template.cfm?Section=Ethics2000">http://www.wisbar.org/AM/Template.cfm?Section=Ethics2000</a>

<b>Wyoming</b>		X		State Bar Select Committee for Review of Disciplinary Functions issued report for public comment. <a href="http://www.wyomingbar.org/pdf/Rules_of_Professional_Conduct.pdf">http://www.wyomingbar.org/pdf/Rules_of_Professional_Conduct.pdf</a>
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