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Recommended Citation

Russell, Irma S., "The Ethics 2000 Process: Revisions to the ABA Model Rules Approved by the ABA House of Delegates" (2002). *Faculty Journal Articles & Other Writings*. 42.

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The Ethics 2000 process: revisions to the ABA Model Rules approved by the ABA House of Delegates

BY IRMA S. RUSSELL

On Feb. 5, 2002, the ABA House of Delegates passed Report 401. It was proposed by the Ethics 2000 Commission for amending the ABA Model Rules of Professional Conduct, thus bringing the work of updating the Model Rules of Professional Conduct near completion. Although the ABA Model Rules have no direct application to any lawyer, they are of great importance because they serve as the articulation of ethical conduct by the leading organization representing lawyers in this country, the American Bar Association.

Moreover, the Model Rules are influential in the process by which states adopt binding rules of ethics. The states use the ABA Model Rules as a model for their rules of legal ethics, generally adopting the formulation set forth in the Model Rules in the vast majority of cases. These state rules apply to each lawyer who practices within their jurisdiction.

The ABA Commission on Evaluation of the Rules of Professional Conduct, also known as the "Ethics 2000 Commission," studied the Model Rules for four years before proposing revisions to the ABA House of Delegates. With the exception of the rules relating to multijurisdictional practice and the unauthorized practice of law, the House debated the proposals at its most recent meetings (August 2001 and February 2002). The House plans to vote on a proposal on multijurisdictional practice at its August 2002 meeting.

This article provides examples of the commission's work and examines a few changes likely to affect lawyers practicing in the environmental arena. In part because of matters of public health and safety, environmental lawyers have special interest in monitoring proposed rules and noting when the requirements of the rules may pose special difficulties or burdens in the environmental area.

For example, the risks associated with the transport of hazardous materials or manufacturing processes may raise concerns about a duty to disclose information that is proprietary. The same subject may create concerns about prohibitions against disclosing information when the disclosure will save a life.

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Changes to clarify the rules

The commission made changes in the text of some rules simply to clarify the existing formulation of the rule. For example, it modified the text of Model Rule 1.16 to make it clear that the lawyer has a right to withdraw from a representation based on two independent bases. First, the lawyer can withdraw for any reason when the withdrawal will not adversely affect the client. Second, even when it may result in a material adverse effect, it is proper to withdraw if the lawyer has good cause, as defined in the rule.

Model Rule 1.6

The House of Delegates and the Ethics 2000 Commission endorsed viable exceptions to the prohibition set forth in Model Rule 1.6. The House approved significant remedial changes to the controversial rule against disclosure of client information in cases where significant harm can be prevented by the disclosure of client information. It also retained the current rule that allows lawyers to disclose client information "to establish a claim or defense on behalf of the lawyer."

The amendments authorize (but do not require) lawyers to disclose client information when the disclosure is necessary to prevent "reasonably certain death or substantial bodily harm." Revised Model Rule 1.6 (b)(1). They also allow lawyers to disclose client information when necessary to "secure legal advice" about compliance with the Model Rules and to comply with "other law or a court order." Revised Model Rule 1.6 (b)(6). By its approval of these amendments, the ABA moved toward rejecting a categorical view of the duty of confidentiality as well as recognizing lawyers as trustworthy decision makers.

The ABA rejected some important amendments proposed by the commission. Subsection (b)(2), would have allowed lawyers to disclose client information to prevent "substantial injury to the financial interests or property of another." This permissive exception allowed disclosure only when the conduct of the client is a crime or fraud and, additionally, the client "has used or is using a lawyer's services" to advance the crime or fraud. Although this exception would have expanded the basis for disclosure, it would have done so only in the rare circumstances of criminal or fraudulent conduct by a client who is misusing lawyer services to further the culpable enterprise.

Because a motion to delete Subsection (b)(2) passed by a substantial margin, the commission

withdrew a related provision that would have permitted lawyers to disclose client information to "mitigate or rectify substantial injury to the financial interests or property of another." Revised Model Rule 1.6 (b)(3). Like exception two, this would have required both culpable client conduct (a crime or fraud) and, additionally, the use of lawyer services to further the crime or fraud.

The rejection of these proposed changes deprives lawyers of discretion to reveal client information to prevent significant harm even when the client has used or is using the lawyer's services to further wrongful and damaging activity.

Moreover, deletion of these provisions may leave lawyers in danger of claims by third parties. The risk of actions by nonclients against lawyers seems particularly pronounced in the environmental area because of the significant public harm that may result from client conduct that relates to environment, energy and resource concerns.

The same analysis of dangers to third parties and the public that led the House of Delegates to pass Subsection (b)(1) to allow lawyers to disclose client information necessary to prevent peril to life and bodily harm also argues for empowering lawyers in other situations when the interests of third parties clearly outweigh the interests of a client. This is the case when a client misuses the lawyer's services to commit a crime or fraud that is likely to result in substantial injury to others. Like the other exceptions, the rejected provisions were entirely permissive.

Model Rule 4.2

The second most controversial model rule debated by the ABA is the rule barring lawyers from communicating with represented persons. Model Rule 4.2, entitled "Communication with Person Represented by Counsel," prohibits a lawyer from knowingly discussing matters with a represented person concerning the subject matter giving rise to the representation. The purpose of this "anti-contact rule" is to protect individuals who are represented by lawyers from contact by other parties' lawyers. The rationale is that the prohibition is necessary to prevent a represented person from disclosing information that may be harmful to his or her interests.

Model Rule 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The rule applies to parties in litigation and, additionally, to nonparties who have retained counsel to represent them in relation to a matter.

The controversy about Rule 4.2 predates the Ethics 2000 Commission process. In 1994, the Department of Justice (DOJ) stated its position that state ethics rules did not apply to criminal investigations conducted by the DOJ lawyers. The department issued a final rule declaring that "the circumstances under which lawyers employed by the Department of Justice may communicate with per-

sons known to be represented by counsel in the course of law enforcement investigations and proceedings." 59 Fed. Reg. 39910-01 (1994). In response, Congress passed the Citizen Protection Act in 1998, expressly stating that government lawyers are subject to state ethical rules.

The prohibition of the anti-contact rule is of particular importance in environmental class actions as well as any environmental matter with numerous parties and numerous professionals. A lawyer engaged in an environmental matter may need to communicate with a professional employed by an opponent. For example, environmental plaintiffs may need to learn the state of contamination of a site or the effects of various options for remediation. Contact with an employee or consultant of an opponent raises concern regarding the anti-contact provision.

The ABA approved the proposed revision to the rule that recognizes a court order as a basis for allowing a lawyer to contact a represented person without seeking the consent of the lawyer representing that person. A comment to the new rule notes the rule's purpose of ensuring the "proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter." Revised Rule 4.2, cmt. 1. The comment also notes the dangers of intruding on the lawyer-client relationship and the possibility of "uncounselled disclosure of information relating to the representation."

Next steps

The changes adopted by the House of Delegates offer significant corrections to the current rules and represent substantial progress toward addressing many of the problems identified with the Model Rules. The next step in the process is the proposal of the Model Rules to the state supreme courts for consideration for amending and updating the state rules of ethics applying to lawyers who practice within the state.

Lawyers who wish to learn more about the revisions approved by the ABA should visit the Ethics 2000 Commission's Web site at <http://www.abanet.org/cpr/html>. Additionally, those who are interested can begin the process of studying and updating the state rules that present binding rules on all lawyers that practice within their jurisdiction.

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Section Spotlight

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To join the Special Committee on Second Generation Issues, the State and Regional Environmental Cooperation Committee or any other Section committee, please go to <http://www.abanet.org/environ/committees/2ndgen.html>

