

Ethics 2000 Commission Issues Timely Report

BY STEVEN C. CRANE

The American Bar Association produced the Canons of Professional Ethics in 1908 and the Model Code of Professional Responsibility in 1969. It introduced the Model Rules of Professional Conduct in 1983, and has amended them approximately 30 times since their introduction. Against that backdrop, the ABA was ready to take a fresh look at the regulatory scheme, one that would be more reflective of “developments in the legal profession and society.”

Thus, in 1997, the ABA formed the Commission on Evaluation of the Rules of Professional Conduct to undertake the first comprehensive review in nearly 20 years of the ethics rules governing lawyers. The Commission issued its “Report on the Evaluation of the Model Rules of Professional Conduct” on November 27. This article summarizes some of the key aspects of the Report and discusses its implications for New York lawyers. [Editor’s note: the Commission’s Report can be found on the Internet at www.abanet.org/cpr/ethics2k.html.]

Early on in its work, the “Ethics 2000” Commission announced that it did not intend to do much more than tinker with the existing platform provided by the Model Rules. The attitude of the Commission was “if it ain’t broke, don’t fix it.” (The Commission’s minutes state: “The Commission agreed unanimously that as an operating principle it would follow a presumptive rule of making no change unless it was substantially necessary.”) Similarly, the Commission rejected at the outset the idea of reinstating any aspirational standards or “better practice” guidelines, such as those contained in the Ethical Considerations of the Model Code of Professional Responsibility and preserved to this date (with modifications) in the New York Code of Professional Responsibility.

Black Letter Approach Retained

Instead, the Commission retained the “restatement-type” format of black-letter rules for the imposition of discipline, supported by official commentary. Indeed, in many respects the driving force behind the work of the Commission was to retrofit the Rules of Professional Conduct to the Restatement of the Law Governing Lawyers, published in August 2000 after nearly 15 years of work by the American Law Institute. In short, what emerged from the Commission was a proposed updating of the existing set of Model Rules, driven to a great extent by the view that the substance of the American Law Institute’s recently completed Restatement of the Law Governing Lawyers should be imported into the Rules.

This is not to say that the Report of the Commission is anything but a scholarly work of the highest order. While we could have hoped for more far-reaching changes in terms of structure or scope, we cannot give the Commission anything less than an “A” for its effort. The 13-member Commission held 39 days of meetings, all of which were open to the public, and held several days of public hearings. [Author’s note: I attended several of these meetings.] Earlier drafts of their proposals were regularly circulated to a 250 member Advisory Council, many of whom commented frequently on the work in progress, and more

refined drafts were circulated generally for review as the Commission's thinking crystallized. The final product reflects the best thinking of some of America's best ethicists.

At this point, the Report of the Commission is being circulated in anticipation of the commencement of debate before the ABA House of Delegates, which is not expected to take up the matter until its August 2001 meeting. We can anticipate that the debate concerning the proposed changes to the Model Rules will be spread over several meetings of the House, with a final product emerging perhaps by 2003.

The debate may inspire New York to revisit its 1985 decision to reject the Model Rules, and to consider scrapping New York's version of the Code of Professional Responsibility - already a hybrid among the Model Rules, Model Code, and provisions that are sui generis - in favor of the Model Rules format, now adopted in 41 states, the District of Columbia and the Virgin Islands. (Simultaneously, the other jurisdictions will be faced with the decision whether to adopt the amended Rules, in whole or in part.)

With that in mind, it is sensible for members of the New York Bar to follow the Ethics 2000 debates, and to have at least a general awareness of what may lie in store for all New York lawyers sometime in the next five to seven years.

Confidentiality. New York has long adhered to the proposition that the need to preserve the sanctity of client confidential information must override any leeway a lawyer may believe is necessary to deal with situations where disclosure would protect third parties or the legal system from substantial harm. The Commission, however, has proposed that the grounds for discretionary disclosure of client information under Model Rule 1.6 be broadened to permit (though not require) disclosure to prevent or rectify substantial injury to the financial interests or property of another. To its credit, the Commission proposes that lawyers be expressly permitted to disclose confidences to obtain legal advice about the lawyer's compliance with ethical precepts.

Conflicts of Interest. The Commission does not propose any sweeping changes to the core conflict of interest rules, but has urged that some of the rules governing issues collateral to conflicts be amended in significant ways. One proposal is that client consent be confirmed in writing in connection with conflict waivers under Rules 1.7 (current client) and 1.9 (former client). Following the lead of New York and other states, the Commission proposes adding a new Rule 1.8(j) that would prohibit sexual relations between a lawyer and client, unless a consensual sexual relationship existed at the time the client-lawyer relationship commenced. Another proposal would remove a lawyer's "personal interest conflicts" from the list of those ordinarily imputed to other lawyers in the firm under Rule 1.10. It is interesting to note that, in its March 4, 1997 Report, the New York State Bar Association House of Delegates proposed doing precisely that by amending DR 5-105(D) to remove DR 5-101(A) ("personal interest conflicts") from the list of rules giving rise to imputation. The Appellate Divisions, however, declined to adopt that proposed change when finalizing amendments to the New York Disciplinary Rules in June 1999.

Preliminary Consultations. Conflicts arising out of preliminary consultations with potential clients, a subject that was plainly in need of treatment, would be dealt with in a new Rule 1.18. The Rule would impose on the lawyer a duty of confidentiality to a person who discusses the possibility of forming a client-lawyer relationship, and, absent consent, prohibits a lawyer from representing any clients against such a prospective client in the matter about which the lawyer was consulted (or one substantially related to it), if the lawyer received information during the consultation that could be "significantly harmful" to

the prospective client in the matter. Other lawyers in the firm would be permitted to undertake such a representation, however, as long as the personally disqualified lawyer is screened. [Editor's note: the February 2001 issue of NYPRR will contain an article by Marvin E. Frankel and Ronald W. Adelman on proposed MR 1.18]

Screening. Indeed, controversial as ever, screening has found its way into the Commission's Report in a big way. The proposed Rule 1.10 would permit non-consensual screening in the case of lawyers moving between firms, except in situations where a moving lawyer had a "substantial role" adverse to a client of the new firm in a proceeding before a tribunal. The personally disqualified lawyer may receive no part of the fee from the representation, and affected clients must be notified. According to the Report:

The Commission was ultimately persuaded that nonconsensual screening in these cases adequately balances the interests of the former client in confidentiality of information, the interests of current clients in hiring the counsel of their choice (including a law firm that may have represented the client in similar matters for years), and the interests of lawyers in mobility, particularly when they are moving involuntarily because their former law firms have downsized, dissolved or drifted into bankruptcy. The Commission understands that there have been few significant complaints regarding screening in the seven jurisdictions whose rules currently permit it.

The elements of an effective screen would be set forth in a new provision of Rule 1.0 on Terminology.

Law Firm Discipline. To a great extent following the lead of New York, the Commission proposes that Rules 5.1 and 5.3, governing supervisory responsibilities, be amended to make clear that the duties imposed by these provisions apply not just to "partners" in a law firm, but to all lawyers with "managerial authority" in a firm and to the law firms themselves. Proposed new Comments to Rule 5.1 discuss the duty of each responsible lawyer to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in a firm will conform to the Rules, including procedures designed to detect and resolve conflicts of interest, to account for client funds, and to ensure proper supervision of inexperienced lawyers, as well as nonlawyer staff.

MDP. Consistent with Resolution 10F adopted by the ABA House of Delegates in July 2000, the Commission has taken no position on the question of multidisciplinary practice. The House had designated the Standing Committee on Ethics and Professional Responsibility to consider whether rules should be developed to address strategic alliances and side-by-side partnerships between lawyers and nonlawyers. [Author's note: The NYSBA House of Delegates approved proposed amendments to the Code of Professional Responsibility at its November 4, 2000 meeting to address these very issues. See, NYPRE, December 2000, p. 2.] Interestingly, however, in a November 3, 2000 memorandum, the Standing Committee stated that it:

has completed a preliminary analysis and concluded that participation in these alliances appears to raise few unique challenges to the preservation of the lawyer's core ethical values and finds that almost all aspects of participation in those arrangements are addressed by the present Rules. The Committee believes few changes to the Rules and Comments need to be considered in light of Resolution 10F.

Multijurisdictional Practice. Whether and under what circumstances a lawyer is engaged in the unauthorized practice of law when doing legal work for a client in a state where the lawyer is not licensed to practice is one of the thorny problems that has led the organized bar to focus on the issue of multijurisdictional practice. The Ethics 2000 Commission recommends significant changes in Model Rules 5.5 and 8.5 to recognize the fact that modern legal practice crosses jurisdictional boundaries in a variety of ways.

Proposed amendments to Rule 5.5 would identify four “safe harbors” for a lawyer practicing outside the licensing jurisdiction: (1) the lawyer is preparing for a proceeding in which the lawyer will be admitted *pro hac vice*; (2) the lawyer is acting on behalf of a client of which the lawyer is an employee, or on behalf of such client’s other employees; (3) the lawyer is handling a matter that is “reasonably related” to the lawyer’s representation of a client in the jurisdiction of license; and (4) the lawyer is “associated in a particular matter” with a lawyer admitted in the jurisdiction.

At the same time, in a subtle change that could have a disproportionate impact on attorneys who advertise across state lines, the Commission would amend Rule 8.5 so that a lawyer who “renders or offers to render any legal services” in a jurisdiction where the lawyer is not admitted is subject to the discipline and rules of that jurisdiction, as well as the jurisdiction in which the lawyer is licensed.

These are but a handful of the dozens of changes, large and small, proposed by the Ethics 2000 Commission. Rest assured that this will not be the last you hear of them!

Steven C. Krane is a partner in the Litigation & Dispute Resolution Dept. of Proskauer Rose LLP He is President - Elect of the New York State Bar Association and Vice-Chair of its Special Committee on the Law Governing Firm Structure & Operation.